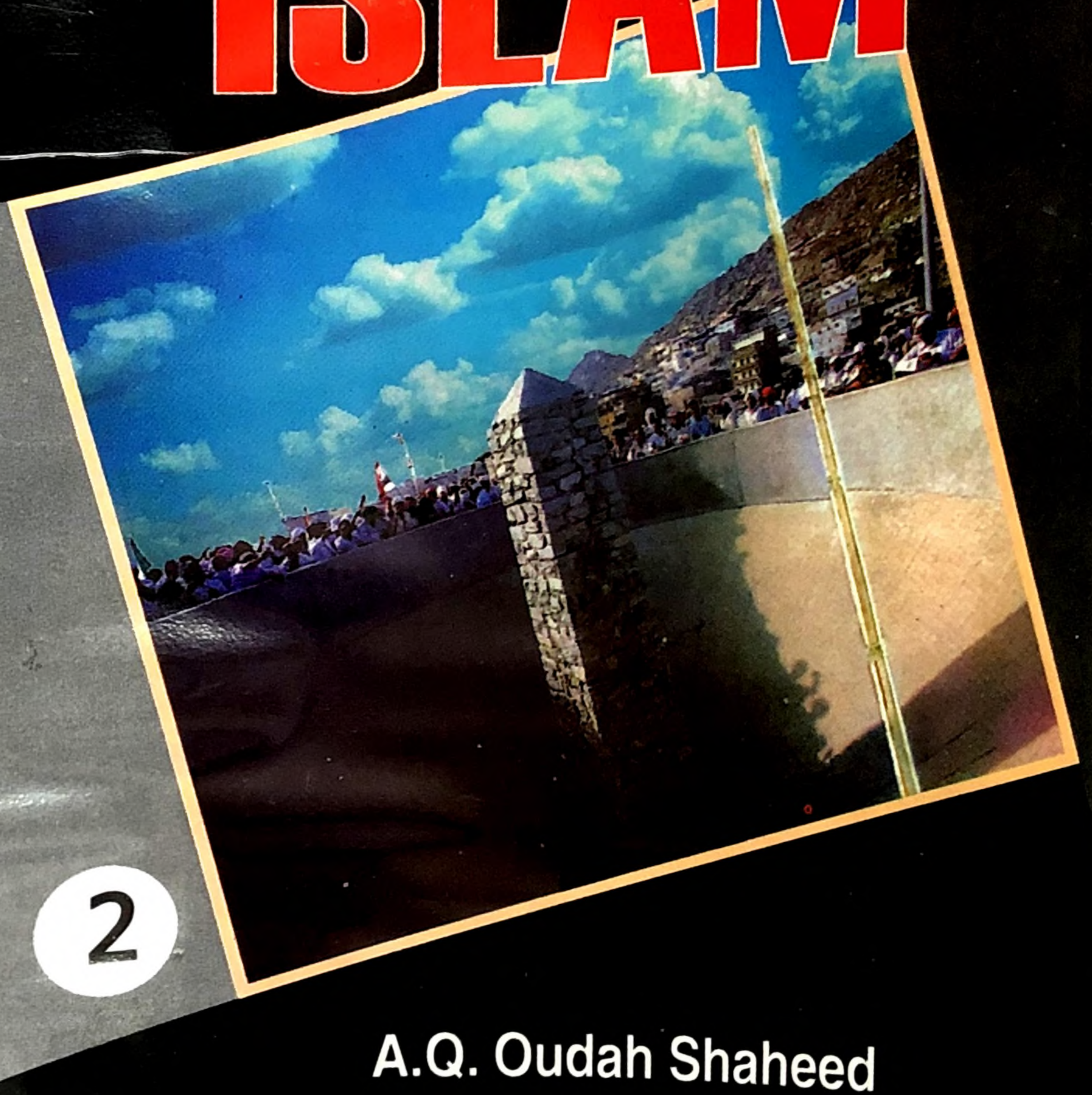
CRIMINAL LAW OF ISLAM



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This book is comprehensive study of the Islamic Criminal Law of Islam and the Modern Law. It essentially consists in an enquiry into the respective principles and theories underlying the Islamic Laws and other Laws and aims at identifying the points of difference and similarity between them.

Criminal Law of Islam

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by

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CRIMINAL LAW OF ISLAM

VOL II

Chapter IV

Application of Criminal Laws to Individuals

(233) Historical Background

Till the end of the eighteenth century the man-made law allowed discrimination between individuals on the basis of their social status. It did not recognize equality of individuals involved in criminal cases. They were rather dealt with differently in matters of judicial proceedings as well as incidence and enforcement of punishment. Courts also varied with the social strata of a nation. Special courts and judges were reserved for aristocracy. Similarly different courts with their respective judges existed for the eclesiastics and the laymen. Again these courts awarded different punishments for the same offences, taking into account the social position of the offender. For instance a commoner was awarded most severe punishment and an aristocrat a lighter one for one and the same offence. The manner of carrying out a sentence passed on an aristocrat too was in keeping with his rank and status. Similarly a commoner was punished according to his degree of inferiority. For instance if an aristocrat was condemned to death, he was beheaded. A commoner, on the other hand, was strangled. Also there were acts which if done by the commoners were treated as offences and the culprits were severely dealt with. But if the same acts were done by the aristocracy or the clergy, they were taken no notice of.

This, then, was the position of legislated criminal laws till the end of the. eighteenth century or the French Revolution. In the wake of that Revolution, however, equality was declared the basis of law and consequently a principle was laid down to the effect that criminal laws are to be eqally applied to all the individuals of the society. Despite this provision the principle of equality

has not yet been enforced in all its aspects, nor has it been possible to break away with the past and get rid of age old traditions. Hence one still comes across cases which are exempted from the principle of equality and consequently disparities are allowed in the administration of justice. One group of legal experts offers apologies for this discrimination and tries to justify it on various pretexts. Other legal experts are critical of it and plead to do away with it. The view of this second group has got the better of the first view; for towards the end of the nineteenth century and the beginning of the present century new acts were framed to narrow down the gap of discrimination. There are indications now that discriminations may come to an end altogether. Majority of thinkers is striving for the promotion and enforcement of complete equality regardless of outcome.

(234) Examples of Discrimination in Modern Laws

Modern laws allow discrimination between the people and the king or head of the state or president of a republic, as the case may be. According to them the head of the state is not above law because he is the fountain-head of law and sovereignty and as such cannot be accountable under the law promulgated by himself and to the power inferior to his own.

The constitutions of some countries declare the king a sacred person. For instance, according to the Danish constitution the king is still sacred and so was the king of Spain under the constitution before she became a republic. The British constitution treats the king as unaccountable and immune, taking for granted that the king is infallible. Similarly the constitutions of Belgium and Egypt declare the king unaccountable and immune. So was it also the case with Italy and Romania before they did away with monarchy.

Under a democratic set-up the head of the state as a rule is unaccountable under the law. Till the end of nineteenth century immunity and unaccountability was the recognized privilege of the head of the state in all the democratic countries. Subsequently, however, democracies of the world raised a voice against this privilege in an attempt to realize the ideal of equality. Thus the French constitution included a provision for calling to account

the President of the Republic in case he was guilty of high treason. Similarly, before the second world war the constitution of Czechoslovakia allowed enquiry against the head of the state if he was guilty of high treason; and after the first world war the Polish constitution had declared the head of the republic accountable under the law in case he was guilty of high treason, violation of constitution and moral crime provided that the parliament allowed by a vote of majority to institute legal proceedings against him. To sum up the modern laws contain three distinct concepts as to the accountability of the head of the state. The first of them is that the head of the state cannot be called to account for any offence at all; the second does hold him accountable for specific offences and according to the third he is accountable for all the offences he may have committed.

No doubt the modern laws have registered a great improvement in respect of the accountability of the head of the state. He was not amenable to impeachment at all till the eighteenth century but after that this concept was discarded and the head of the state was declared accountable under the law wholly or partially.

(2) Privilege of the Foreign Heads of States

Modern laws inhibit calling to account the kings and heads of foreign states for the crimes they commit in countries other than their own whether they go to those countries in their official capacity or in disguise. The same privilege is allowed to all the dependants of the kings and heads of states. The argument advanced by the scholars of modern law in favour of such a privilege is that permission of legal proceedings against the foreign heads of states and their dependants is not consistent with hospitality, honour and respect due to them. But this argument is not tenable because no head of the state would stoop to the extent of committing an offence. If he does he would exceed the limits of hospitality. This also holds good in the case of the dependants of foreign heads of states.

This legal exemption is actually an old tradition reminiscent of the age when the principle of equality before law was not recognized. The same tradition is still alive as a part of both the national and international laws in force today. It is common

knowledge that the tempo of improvement in national laws has been greater than in international laws.

(3) Privilege of Foreign Diplomats

According to modern laws ambassadors and diplomats of foreign countries together with members of their staff and families are exempted from proceedings under the law of the land to which they are accredited. Scholars of modern laws justify this exemption on two grounds. They argue that diplomats represent their country in the state where they are deputed and as such are not amenable to trial by that state, inasmuch as one state cannot award punishment to another state and also that such an exemption is necessary for enabling them to carry out their duties effectively and making them immune from involvement in criminal cases necessitating their arrest and investigation and legal proceedings against them that might impede the due discharge of their duties. The answer to these two arguments is that a foreign diplomat is actually the citizen of a foreign country and every country has the right to punish a foreign national for any offence he may have committed there and that if the law of the land is, in the final analysis, applicable to a foreign diplomat who respects that law by abiding thereby and abstaining from doing anything that might make him liable to proceedings thereunder, the question of prejudicing his duties does not arise at all.

(4) Privilege of Members of Legislature

The modern laws exempt elected representatives of the people in countries having popular governments from punishment for whatever they may say while discharging their duties. The Egyptian law has adopted this principle and accordingly exempts the members of Parliament from punishment for ideas and opinions they may express on the floor of the house.[1] In other words, they are forgiven for offences they commit verbally or in writing. This is a privilege designed to allow adequate freedom to the members of parliament enabling them to perform their functions smoothly and effectively. It is, however, another thing that such an exemption is a flagrant violation of the principle of equality; for there are other

1. Egyptian Constitution, Article 109.

representative bodies whose members are not allowed the same guarantees against legal proceedings as the members of parliament. Again, there are important individuals who have much more to do with the problems of the people than the members of the parliament but they have not been allowed the same immunity as the latter.

(5) Privilege of the Rich

Modern laws admit of preference of the rich to the poor. An example of such a discrimination is provided by the Egyptian law of criminal investigation under which the court has to sentence the accused to imprisonment and require surety in cash designed to postpone action on the sentence pending the disposal of appeal against it. If he fails to provide the requisite bail in cash, he is to be imprisoned without waiting for the appellate courts verdict. Now this amounts to gross violation of the principle of equality; for an affluent person always be in a position to secure his release on bail, while an indigent accused will fail to provide the requisite bail in cash and, therefore, the sentence of imprisonment passed on him would come into effect immediately.

Although the Egyptian law of criminal investigation provides for the right of the offender to challenge his imprisonment and the court may consider the objection raised by him and waive the condition of bail for his release.

At any rate this condition militates against the principle of equality; for a well to do person can always escape imprisonment by providing the requisite bail in cash; whereas a poor man who is in most cases not in a position to do so will be suffered to rot behind the bars. May be that the court at a later stage exculpate him of the allegations for which he is committed to prison. This means that he is penalized for no fault of his simply because he is unable to pay the amount of bail, or to be more accurate, he is jailed because of his indigence.

(6) Privilege of Prominent Members of the Society

Under the modern laws the prominent members of the society are given preference to the common run of the people. Thus the public prosecutor can file a case against the accused without

obtaining prior permission. But if the accused is a government servant, lawyer, doctor or a member of parliament or some other distinguished personality, the public prosecutor will have to obtain permission of specific agencies before bringing of legal action against him. Besides, the public prosecutor may be contented with departmental action against any of the prominent persons mentioned above and prevent legal proceedings against him. Thus the accused would escape punitive measure. But such safeguards against punitive action is not guaranteed to the common man.

A person affected by the commission of an offence may, under the Egyptian law, demand compensation for the loss he may have suffered. But the courts in determining the damages and amount of compensation will take into account the social and financial position of the affected person. If the manager of a company and a worker thereof both equally suffer in an accident and demand damages, the manager will be awarded a big compensation while the worker would be allowed only a paltry amount of compensation.

The Egyptian law has the same criterion of determining the compensation of workers who die or are disabled in accidents taking place while they are at work. Thus in fixing amounts of compensation to be paid to such workers or their heirs for a fixed period, the victims status is kept in view.

If he belongs to an inferior category, his compensation will be less than that to be paid to an employee of higher rank affected by the same accident. The result is that if two workers lose, for example, their right arms, right hands and right thumbs in one and the same accident taking place in the same factory, the compensation paid to the inferior worker would be less than the amount paid to the superior worker.

(235) Modern Laws and the Shariah Compared

Modern Laws have adopted a deficient principle of equality which does not ensure equality between the head of the state and the public, the ruler and the ruled, one set of individuals and another, groups of the rich and the poor.

1. Reader are referred to articles 25-29 of thc Egyptian Penal Law which relate to workers affected by accidents.

To the surprise of those who are ignorant of the Islamic Shariah, the principle incorporated in the modern laws in an imperfect form, is to be found in the Shariah complete in all its aspects. Nor is this all. The Shariah has the distinction of providing for complete equality before law fifteen hundred years ago; whereas it was introduced into the modern law in its crude form only towards the end of the eighteenth century.

The idealists who dream of perfect equality before law are advised to turn to the Shariah as the principle of pure equality which they are looking for is to be found only there. The Shariah has not contented itself with merely providing for perfect equality but has also raised a complete edifice thereon which presents such a beautiful blend of form, structural durability and justice that the discerning eye and the analytical intellect are astonished at it. In short, the idealist thinkers will find in the Shariah their utopia in a practical shape.

(236) The Concept of Equality in Shariah

The Shariah contained the principle of complete equality *ab initio* and enforced it in a form perfect in all its bearings, which no strings attached thereto and no exemption allowed therefrom. It was unqualified equality between individuals, groups, communities, races, the ruler and the ruled, the head of the state and the people at large. It admitted of no superiority of one individual over another, of the white over the black, of the Arab over the non Arab. Says Allah:

> "O Mankind ! We have created you from a male and a female and made you tribes and families that you may know each other. Surely the noblest of you with Allah is the most dutiful of you."

The Holy Prophet also underlines the importance of equality in the following words:

> "People are equal like the teeth of a comb. No Arab is nobler than a non-Arab, save by virtue of righteousness."

Again,

> "Allah has, by means of Islam, done away with vanity engendered by pagan ignorance and pride by the sense of social superiority; for all humans are the progeny of Adam

and Adam was created out of dust. Who is more righteous is in reality more honourable with Allah."

In short, all men are equal in the eyes of Islam, regardless of the races and nations to which they belong. They arc equal both in respect of rights and duties and also of account ability equal like the teeth of a comb which are all even. All men are equal as the off-springs of the same parents should be. Since they have all sprung from the same source, their rights and duties are identical and they are all accountable alike. No individuals are superior to others as the Britishers and the French are treated as superior to the people of their colonies; nor is a white man superior to a black man as he is in U.S.A.; nor an Arab to a non-Arab. In other words, no race is better than any other race as Germany and other European countries boast of their superiority over other races of the world.

The only criterion of distraction according to the Shariah is righteousness and that too, with certain reservation. This kind of distinction, above all, has nothing to do with the affairs of the world. It is distinction as looked upon by Allah. A righteous man is close to Him. But the distinction of being close to Him does not mean that he acquires more rights than others. Righteousness affects man's relationship with Allah and not human relations. Thus the pre-eminence which owes its origin to righteousness is not national superiority but spiritual distinction.

The principle of equality is applied by the Shariah as extensively as the human mind can conceive. Thus the Shariah does not admit of any distinction between the head of the state and the common people, kings and their subjects, members of diplomatic corps and the public, the haves and the havenots, the distinguished members of the society and the down-trodden. We now proceed to illustrate Islamic equality by examples of cases wherein we have already attempted to show inequality as allowed by the modern laws.

(237) Equality between Head of States and the People

According to the Shariah the heads of States and the common people are equal before law and are equally accountable for their deeds. It looks upon the heads of the states as mere individuals

having no personal sanctity or distinction. If any of them is guilty of an offence he is liable to punishment like an ordinary individual.

The Holy Prophet himself who was the head of the state besides being a Messenger of Allah did not claim for himself any personal sanctity or distinction. In fact he used to cite the following verses of the Holy Quran in this connection:

> "I am a human being like you except that I receive this divine message."
>
> "Am I aught save a mortal messenger." (17:93)

The Prophet established equality by his example among all the Muslims high and low. Once a villager came to him and was overawed by his prophetic dignity. The Prophet pacified him and said, "Be calm! I am also born of a woman who ate dried meat."

Once a creditor demanded back his money from the Prophet in a rough manner. Hazrat 'Umar (R.A.A.) who was present couldn't forbear the man's misbehaviour and moved towards him. But the Prophet said to him, "Stop 'Umar! You should rather ask me to pay back his loan and advise him to exercise restraint."

During his last days the Holy Prophet came to the pulpit supported by Fazl bin Abbas (R.A.A.) and Hazrat Ali (R.A.A.) and addressed the believers in the following words:

> "O People! If I have scourged the back of anyone, I present to him my back to be scourged in the like manner. If I have disgraced anyone, I am here to be retaliated. If I have taken away anything belonging to anybody, he may have his share from my property. No one should be apprehensive of my animosity because animosity is out of my character. In fact, the dearest to me is he who has a right to me which he should take or forgo so that when I meet my Lord, I may be relieved of all my responsibilities."[1]

After the demise of the Holy Prophet, his caliphs followed his example and translated his teachings into action. Thus Hazrat Abu Bakr (R.A.A.) appeared at the pulpit immediately after the assumption of the caliphate and announced the enforcement of the principle of equality, doing away with all the distinctions:

"O People! I have become your ruler, but am in no way

1. *Ibn-ul-Aseer's History*, Vol.2, Page 154.

better than any of you. When I do anything good, follow me but when I go wrong correct me. He made it clear at the end of the same address that the people who elect the Caliph have the right to depose him as well:

"As long as I obey Allah and the Holy Prophet, follow me but when I disobey, you will not be under the obligation to obey me."[1]

When Hazrat 'Umar (R.A.A.) assumed the reins of Caliphate, he laid still greater stress on equality. He even went to the length of declaring that an unjust ruler should be executed. He observed, "I wish that if you and I are aboard the same ship which is tossed up this way and that by the rise and fall of the waves, the people should even then choose a ruler. If he goes a right follow him, but if he swerves from the right path, execute him."

Hazrat Talha asked, "Why did you not say if he went wrong he should be deposed?

Hazrat 'Umar (R.A.A.) replied: "No execution would serve as an example for his successors."[2]

Hazrat Abu Bakr (R.A.A.) did not only subject himself to retaliation by the aggrieved party but also saw to it that his governors did the same. Hazrat 'Umar strictly adhered to this practice and offered himself for retaliation many a time.[3] When questioned about it, he replied,

"I saw the Prophet and Hazrat Abu Bakr (R.A.A.) subjecting themselves to retaliation and I follow suit."

An example of the strictness with which Hazrat 'Umar adhered to this practice is borne out by the example of a man who was beaten by him. The victim said to the Caliph:

"My position is identical with either of two persons. One being ignorant learns that he is at fault and the other being one who commits a fault and is pardoned."

Hazrat 'Umar accepted his plea and offered himself for retaliation.[4] The Caliph ensured that his governors followed his example. He subjected every governor to retaliation by any common man who was a victim of his injustice and cruelty. In order to

1. *Ibid,* Vol.2, Page 160.
2. *Ibn-ul-Aseer's History* Vol.3, Page 30.
3. *Ibn ul Jauzi,* Life of 'Umar bin Khattab, Page 113-115.
4. *A'lam,* Vol. 6, Page. 44.

strictly enforce the principle of just reprisal he summoned the governors of all the cities during the Hajj season and addressed the people in the presence of those governors in the following words:

"O people! My governors are not appointed to strike you in your faces and grab your property. I rather send them to teach you. Your faith and acquaint you with your Prophet's practice. If any governor deviates from this course, report to me. By God! I will see to it that he pays the price of it."[1]

On hearing this Hazrat Amar bin Al Aas rose and said: "If a person from among the believers is appointed the ruler of the people and in this capacity he chastizes anyone, would you subject him also to retaliation?"

"By God! I will" replied the Caliph, "How can I do otherwise as I saw the Prophet offering himself for retaliation."[2]

In short legal proceedings were instituted in ordinary courts against kings and governors in a normal way. For instance, during the caliphate of Hazrat Ali (R.A.A.) an iron armour was lost. It was later recovered from a Jew. The Jew claimed it to be his own. Hazrat Ali (R.A.A.) preferred a case against him in the Qazi's court. But the Qazi decided the case in favour of the Jew. Again, Mughyara the governor of Kufa, was accused of adultery. He was tried for the alleged offence according to the normal judicial procedure.

History tells us that Caliph Mamoon had a dispute with someone which he preferred to Qazi Yahya bin Akram. The Caliph went to the court followed by a valet with a carpet for him. But the Qazi did not allow him to have a special seating arrangement in the court as it would have amounted to discrimination against the other party. So he advised the Caliph not to have for himself such a discriminatory seating arrangement. Mamoon felt ashamed and sent for another carpet for the respondent to sit on.

Disputes between the people and the Caliphs or his governors were settled purely in the manner prescribed by the *Shariah,* that is by means of adjudication. Hazrat 'Umar, for instance, adopted

1. *Abu Yousuf, Al Khiraj,* Page 65.
2. *Ibn-ul-Aseer's History,* Vol.3, Page 208.

this method. Once he got a horse on approval. But it died as he rode on it. The owner of the horse started wrangling with the Caliph, whereupon he offered to appoint an arbitrator to settle the dispute. The owner of the horse named Qazi Shareeh Iraqi to act as arbitrator. Hazrat 'Umar agreed and asked Qazi Shareeh to adjudicate. Shareeh said to the Caliph that as he received the horse in a perfectly good condition, it was incumbent upon him to return it unimpaired. Induced by the just decision of Shareeh, Hazrat 'Umar appointed him Qazi.

The jurists of Islam have laid down many a qualification for the Imam which is not possessed by an ordinary man. But, notwithstanding, they treat him as equal to the common people before law and have not allowed him any privilege in this respect. All the jurists agree that the Imam is equal to any ordinary man before law. This doctrine of equality is applied to governors, officials, sultans and all those kings who owe allegiance to the Caliph - However, the jurists differ on the question of the applicability of this doctrine to the Imam who has no authority over him.

There are two views as to the application of the Shariat provisions to such a supreme Imam.

First View

According to Imam Abu Hanifa if the Supreme Imam is guilty of a *hud* offence like adultery, drinking or false accusation he will not be called to account except where *qisas* and payment of compensation is involved. However, if he commits homicide or destroys the property of someone, he will be liable to impeachment. The argument advanced in support of this view is that *hud* is the right of Allah and establishment thereof is the responsibility of the Supreme Imam. Obviously, the Supreme Imam cannot possibly subject himself to a *hud.*

The reason for this is that *hud* takes the form of infamy and torment and nobody can meted out such a treatment to himself while there is no authority over the Imam who can subject him to *hud.* Now the benefit of the obligation of a *hud* depends on execution thereof. Thus if a *hud* cannot possibly be carried out, it will not be obligatory. On the contrary, *qisas* and compensation

for the loss of property constitutes the right of the people. The claimant of such a right is the person whose right has been violated and, therefore, the position of the Imam in this respect is not any different from an ordinary individual. If such an aggrieved individual is unable to claim his right, the people will go to his help and enable him to have it. Hence the necessity of punishment is effective where violation of people's rights is involved.[1]

To sum up, the supreme Imam is not liable to punishment for offences prejudicing collective rights. This is not because he is exempted from punishment, but because it is difficult to punish him as he is superior to all and inferior to none, and also because offences affecting collective rights fall within the exclusive jurisdiction of the Imam and as such are beyond the power of individuals. Although punishment for such offences are obligatory in themselves, yet the supreme authority of the Imam inhibits punishment for offences committed by himself. It will be obviously unreasonable that the Imam should disgrace and torment himself. Now as the enforcement of punishment is difficult, the punishment will, in effect, be inhibited and will not be obligatory.

With Imam Abu Hanifa, in other words, an unlawful act will remain unlawful in itself and will as such be treated as a culpable offence but its punishment will not be obligatory on account of the insurmountable difficulty in the way of its enforcement. It may be inferred from this that if the Imam being a married person commits adultery and is killed by someone, the killer will not be liable to condemnation to death; for the victim is a person whose murder is lawful[2] as the prescribed punishment for a married adulterer is death. It is a capital punishment that can neither be put off nor remitted. Killing of an adulterer is obligatory. As it is essential to root out the evil of adultery and enforce the *hud* laid down by Allah, the man who kills the adulterer carries out his duty and, therefore, cannot be treated as a murderer.

As for the offence prejudicing the rights of the individuals

1. (a) *Sharh Fath-ul-Qadeer,* Vol.4, Page 160-161.
   (b) Al, Bahrul Raiq Vol.5, p-20.
   (c) Al Zela'ee, Vol.3, P.187.
2. *Hashia-Tahtawi,* Vol.4, P.260.

life killing or wounding, Imam Abu Hanifa is of the view that if the supreme Imam is found guilty of any of them he will be punished since the power to enforce the prescribed punishment does not vest with the Imam. It is the victim or the heirs or guardians of the victim who have the authority to put it into effect. The Imam in such cases simply represents the individuals and he does so in order to ensure that no individual is wronged or harmed. Hence if the Imam commits an offence of this nature the aggrieved party has the right to enforce the prescribed punishment or demand the enforcement thereof and seek the help of the court or society to have it enforced. It does not matter if some individuals manage to apply the prescribed punishment on their own without having reccurse to a court of law, inasmuch as they will be exercising their right in punishing the culprit.

If the Imam appoints a deputy or Qazi, conferring on him the power to take cognizance of all the offences, the latter will be competent to call the Imam for every offence committed by him, whether it amounts to the violation of the rights of Allah or those of the individuals. In other words, if the courts under the present system of allocation of powers are entrusted with the task of the enforcement of the *Shariat* they will be competent to award punishment for every offence committed by the supreme Imam.[1]

The objection raised to the above view of Imam Abu Hanifa is that it rests on untenable grounds; for the Imam, in reality, is the vicegerent of the community and it is the Muslim community as a whole to which the Shariah addresses itself and not to the Imam. The community appoints him for the purpose of enforcing the injunctions of the Shariah keeping in view collective interest. Hence if anyone commits an offence, the Imam will punish him or her because the community confers on him as its vicegerent the power to put into effect the provisions of the Shariah. If the Imam himself is guilty of an offence the power will revert to the community which will award punishment to the Imam on the grounds that owing to his commission of offence the Imam is disqualified from the vicegerency of the community.

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1. *Sharh Fathul Qadeer*, Vol.4, P.161.

Second View

The second view has been advocated by the three major jurists Malik Shafi'ee and Ahmed. They do not differentiate between various offences and hold the Imam or the head of the state responsible for any offence he may commit whether it violates the rights of Allah or rights of the individuals; for the provisions of Shariah are of general nature according to which all offences are unlawful for the people including the head of the state. Thus if the head of state or the Imam commits an offence he will also be liable to punishment. The three jurists unlike Imam Abu Hanifa do not consider the feasibility of punishment since punishment is not put into effect by the Imam alone. It is rather enforced both by him and his deputies. Therefore, if the Imam commits an offence, his deputies who are vested with the power of punishment will punish him.[1]

The jurists have not contented themselves with a discussion of punishment. They have also dealt with the question whether the Imam stands deposed by committing an offence. Thus some of them maintain that if sensual desires get the better of his reason and he is driven by them to commit unlawful acts and indulges in evils, he stands deposed inasmuch what is unlawful is iniquity and the Imam's office cannot co-exist with iniquity. No one with iniquitous habits can accede to the office of the Imam.[2]

(238) Foreign Heads of States

As the Shariat does not admit of any special privilege for the Head of the Islamic State, it is evident that it does not provide for any special treatment for a foreign head of the state.[3] In fact,

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1. (a) *Al Mudawwana;* Vol. 16, P.57 (b) *Mawahib-ul-Jaleel* Vol.6, P.242, 296, 297.
   (c) *Al Iqna,* Vol.4, p.244 and 245.
   (d) *Al Sharh-ul-Kabeer,* Vol.9, p.342, 343 and 382.
   (e) *Al Muhazab,* Vol.2, p.189. (f) *Al Umm,* Vol.6, p. 36.
   (g) *Fiqh – al - Quran Wal Sunnah,* p.97.
2. *Al Mawardi, Al–Ahkamus-Sultaniah* p.14; *Asna–ul-Matalib* Vol. 4, p. 97.
3. By foreign states is meant countries of Darul Harb. Islamic states are not foreign to each other. The heads of Islamic states cannot be forgiven for whatever offences they commit. According to the Shariah if they commit offences anywhere in Darul Islam, they shall be punished. In fact, they are liable to punishment for any offences they may commit in Darul Harb. (For further details please see article 218).

the Shariah is equally applicable to the Heads of foreign states and their entourage while they are in an Islamic country. Thus if the Head of a foreign state is guilty of an offence in Darul Islam he will be liable to the prescribed punishment. Imam Abu Hanifa's view that punishment of the Head of the state for an offence committed by him in violation of collective rights is not possible does not hold good at all in the case of foreign heads of the states; for the view proceeds from the proposition that the Imam cannot possibly enforce upon punishment upon himself. But in the case of a foreign head of the state the culprit to be punished is a person other than the Imam.

However, the head of a foreign state belonging to Darul Harb and member of his entourage may benefit from thc position of Imam Abu Hanifa with regard to protected person. Evidently the heads of such states are all protected persons and the view advanced by Imam Abu Hanifa regarding protected persons is that they are liable to offences committed by them in Darul Islam in violation of the rights of individuals and they will not be punished for such offences as are prejudicial to collective rights. But Imam Abu Yousuf differs with Imam Abu Hanifa in this respect. He rather concurs with the other major jurists who hold that a protected person will be punished for all kinds of offences he commits in Darul Islam.[1]

(239) Members of Diplomatic Corps

Members of diplomatic corps will be punished for the offences they may commit in Darul Islam, whether they violate thereby the rights of the individuals or the community. The Shariah provides no exemption for them, except of course, when we bring to bear on them the view of Imam Abu Hanifa who holds that the injunctions of the Shariah are applicable to a protected person only if he commits an offence to the detriment of the rights of the individuals but if he be guilty of an offence to the prejudice of collective rights, he will not be liable to punishment.

It may be mentioned here that only those members of the embassies will be treated as protected persons who are non-Muslims and citizens of Darul Harb and also represent a country of Darul

1. Article No. 214 and the following articles.

Harb. But the Muslims representing an Islamic country or belonging to Darul Harb are not be regarded as protected persons. They will rather be subject to the same injunction as applies to any Muslim citizen of Darul Islam.

The position of the Shariah as to the punishment of foreign diplomats for the offences specified above is unquestionable; for it seeks to place them on equal footing with the citizens of the state themselves and to apply the same principle to them as it does to the foreign heads of the states. It is as a matter of fact the man made laws are open to objection. Since they allow distinction between the people and the diplomats on grounds of the desirability to support the latter and to facilitate in the discharge of their duties not with standing the fact that the diplomat guilty of an offence does not deserve any support and is quite incapable of carrying out his duties. There can be no greater safeguard for a foreign diplomat than to conduct himself in a manner above suspicion and abstain from any thing unlawful. The apprehension that the liability of a foreign diplomat may be used to pressurize him is baseless, since there are innumerable ways to exert easier and more effective pressure on him. Hence declaring a foreign diplomat immune from legal proceedings is no guarantee against his pressurization. In any case all the arguments advanced in support of the immunity of foreign diplomats from legal proceedings do not warrant his entitlement to any distinction.

(240) Members of Legislative Body

The principles of the Shariah do not admit of any exemption for the members of parliament from punishment for verbal offences committed by them on the floor of the house as it does not discriminate between one individual against another or one party against another. It never allows an individual or party, whatever its position or function may be, to commit an offence.

Some people maintain that the modern law is better than the Shariah in this respect. But if you give a little thought to this question, you will be convinced that in this aspect, too, the Shariah is superior to the modern law, whether we look at it from a purely technical angle or from social and moral stand point.

The truth of the matter is that according to the modern

the Shariah is equally applicable to the Heads of foreign states and their entourage while they are in an Islamic country. Thus if the Head of a foreign state is guilty of an offence in Darul Islam he will be liable to the prescribed punishment. Imam Abu Hanifa's view that punishment of the Head of the state for an offence committed by him in violation of collective rights is not possible does not hold good at all in the case of foreign heads of the states; for the view proceeds from the proposition that the Imam cannot possibly enforce upon punishment upon himself. But in the case of a foreign head of the state the culprit to be punished is a person other than the Imam.

However, the head of a foreign state belonging to Darul Harb and member of his entourage may benefit from thc position of Imam Abu Hanifa with regard to protected person. Evidently the heads of such states are all protected persons and the view advanced by Imam Abu Hanifa regarding protected persons is that they are liable to offences committed by them in Darul Islam in violation of the rights of individuals and they will not be punished for such offences as are prejudicial to collective rights. But Imam Abu Yousuf differs with Imam Abu Hanifa in this respect. He rather concurs with the other major jurists who hold that a protected person will be punished for all kinds of offences he commits in Darul Islam.[1]

(239) Members of Diplomatic Corps

Members of diplomatic corps will be punished for the offences they may commit in Darul Islam, whether they violate thereby the rights of the individuals or the community. The Shariah provides no exemption for them, except of course, when we bring to bear on them the view of Imam Abu Hanifa who holds that the injunctions of the Shariah are applicable to a protected person only if he commits an offence to the detriment of the rights of the individuals but if he be guilty of an offence to the prejudice of collective rights, he will not be liable to punishment.

It may be mentioned here that only those members of the embassies will be treated as protected persons who are non-Muslims and citizens of Darul Harb and also represent a country of Darul

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The truth of the matter is that according to the modern

laws verbal offences are based on dissimulation and hypocrisy. They regard a liar and veracious person as equally liable to punishment. The principle laid down by the modern law in this regard is that no individual can caluminate or abuse another individual or find faults with him. If he does, he will be liable to punishment whether or not he speaks the truth. But this principle protects the evil doers, criminal and iniquitous persons against the censure of truthful people on the one hand and guards the virtuous and truthful people from calumniation and denunciation by the liars.

The above principle actually does away with the distinction between the virtuous and the wicked, the moral and the immoral, the good and the evil. It is this principle that has been responsible for the moral decline of nations as it prevents good people calling a wicked man the wicked and encouraging the wicked to go on committing misdeeds. It prohibits calling a spade spade i.e. an adulterer, adulterera liar liaf and a thief thief. Anyone doing it will be liable to punishment. Nor is this all. Under the above principle the adulterer, the thief or the liar will not only have legal safeguards but is also entitled to monetary compensation in lieu of the charges levelled against him even if the charges are true.

This legal tennet as to verbal crimes inhibits the people from speaking the truth, abstain from evils and from degrading the wicked in order to exalt the virtuous and uphold virtue.

The Egyptian law has realized the dangers of the application of this principle and has provided for the following exceptions thereto.

(1) If anyone objects to the conduct of a public servant, a public representative or a person carrying out official duties, he will not be liable to punishment provided that the objector does it in good faith and his objection is not designed to prejudice official work or duties pertaining to public service or election authority and that he proves the charges levelled by him. The purpose of this exemptory provision of the Egyptian law is that a public servant, elected representative or person performing public functions should be conscious of his amenability to criticism and should consequently conduct himself in the best possible manner.

(2) When general elections are held it is permissible under article 68 of the Egyptian law to make true and candid comments on the conduct and character of the candidates during electioneering campaign, whereas under the normal circumstance similar comments under criminal laws of the land would be punishable. The permission to subject candidates to criticism during electioneering campaign is designed to allow a candidate to say with immunity whatever he has to say about the character and conduct of another candidate or a voter about the candidate enabling the voters to distinguish between the fitness of various candidates and elect the right man after listening to everything about all the candidates in the field.

(3) According to article No. 109 of the Egyptian law, the members of parliament are not accountable for the ideas and views they express on the floor of the house when it is in session. This provision is meant to allow complete freedom of speech to the representatives of nation in the parliament.

It may be mentioned here that the last mentioned exemption is different from the first two as these provide that the accuser will be immune from punishment if the charges levelled by him are found to be true, while the members of parliament are free to say with impunity any thing, true or false. They are neither accountable nor liable to punishment for whatever they say.

(4) Article No.309 of the Egyptian penal law provides that the false charge or abuse resorted to in defence by either party and its lawyers in the court verbally or in writing is exempted from punishment. Such false charge or abuse may be amenable to civil proceedings or disciplinary action.

At any rate it may be taken into consideration that the accuser and vituperator is not liable to punishment whether he is truthful or untruthful.

The above principle as found in the Egyptian law is shared in general by all the modern laws. The exemptery provisions of the Egyptian law mentioned above are also found in most of the other modern laws.

The glaring discrepancy and incoherence which constitutes a technical flaw of the Egyptian law is evident. Thus if the basic principle upholds the protection of the individual's personal life,

then the exemptions therefrom would prejudice both the personal and public life of the individual.

But if the expression of anything false or true by word of mouth is forbidden, then some of the exemptions from the principle in question would inhibit only the expression of truth while other exemptions would inhibit the expression of both truth and falsehood. There can be no greater discrepancy and inconsistency than this.

The moral and social weakness of the modern law consists in its concern with the protection of individual's personal life which has led to the degenertion and decadence of the society; for it is the individuals, who go to make up the society. If the individuals are good, the social setup formed by them will also be sound. The inevitable outcome of ensuring the immunity of individuals against criticism will evidently be that they will be depraved and their souls will cease to militate against evil. Unless we root out evil from the hearts of the wicked individuals, we cannot hope to create a morally sound milieu. A set-up constituted by such wretched individuals would be like an edifice raised with broken and worn out bricks that is bound to collapse.

On the contrary the basic principle of the Islamic Shariah with regard to verbal offences is that falsehood and misrepresentation is forbidden under all circumstances and truth is always obligatory. Therefore, according to the Shariah the person who speaks the truth is in no case liable to punishment, nor is one accountable for calling the people by appropriate names and identifying the real qualities they possess. If one calls an adulterer an adulterer, a thief a thief, and a liar a liar and proves at the same time, that he is really so, one will not be amenable to punishment.

The principle admits of no exemption but allows every person the right to criticize public servants, elected representatives of the people and the functionaries dealing with public affairs. If he can prove his allegations he can attribute the alleged qualities to the persons concerned. Nor is this all. If he is in a position to prove the charges levelled by him, he can call into question the personal life of anyone he censures along with his conduct of public affairs. The functionaries dealing with public affairs or

engaged in official work are not permitted to take exception to the divulgence of their faults and weaknesses.

The Shariah unlike the modern laws does not provide for the safeguard of the private life of public servants a similar functionaries against criticism, since it cannot protect hypocrisy, falsehood and fraud. According to the Shariah anyone who is vicious in his private life, is unfit for the conduct of public affairs.

The Shariah allows everyone to speak of a virtuous person as virtuous and a wicked one as wicked at any time including the electioneering campaign, provided that he can prove his charge against the person he alleges to be wicked. Anyone, whether he is a member of parliament or some other person or one who is not qualified to be a member of any institution at all has the right to attribute any fault to anybody on the condition that he can produce tangible proof of his allegation. There is nothing in the Shariah which allows stating the truth while elections are in progress and prohibiting it under the normal circumstances. According to the Shariah telling the truth is always obligatory and telling lies is always forbidden.

Again, unlike the modern laws the Shariah does not prevent the members of parliament or the plaintiff and the defendant involved in a case to state truth and utter falsehood at the same time; for it would place truth and falsehood on the same footing whereas under the Shariah telling the truth is obligatory and telling lies is totally forbidden. For this reason the plaintiff and the defendant cannot be allowed to state both truth and falsehood. As for the members of parliament, they enjoy the status of counsels holding independent opinions of their own. If they are permitted to tell lies, protected against punishment and are expected to tell lies their consul would be worthless, and the people will be under the impression that they do not always speak the truth. Moreover, the principle of equality is one of the basic tenets of Islam and the distinction enjoyed by the members of parliament or the plaintiff and defendant is incompatible therewith.

In short, under the principle laid down by the Shariah as to verbal offences, statement of truth is obligatory and falsehood

totally forbidden. The above principle is based on equality and is absolutely in consonance with reason and morality. It aims at reforming the society and reorganizing it on strong and sound basis, encourage goodness and thwart wickedness, provide moral training to the individuals and ensure supremacy of goodness in the social system. It is obvious that this principle of the Shariah has greater force and potentialities than the frail and incoherent modern law.

(241) Discrimination between the Rich and the Poor

The Shariah does not admit of distinction between the haves and the have-nots. According to it the rich and the poor are equal before law. It contains no provision that allows the rich to take undue advantage of their affluence and the poor to suffer because of their indigence. Thus the Shariah does not permit the release of a prisoner on bail in cash, since such a bail does not fit in with the system of equality.

However, the Shariah admits of release on personal bail. It is admissible in the case of a debtor who is sentenced to imprisonment in default of payment, such a defaulter may be released on personal bail. Now a defaulter is sentenced to imprisonment because he does not repay the loan notwithstanding that his capability to do so, but is not in a position to pay a fixed amount readily.

The jurists treat the detention of an accused for investigation and trial as a penal measure i.e. a punishment necessitated by his being under a charge-sheet. If such detention is looked upon as a penal measure, it follows that the accused cannot be released on bail. Some jurists, however, hold that detention in this case constitutes a precautionary measure[1] rather than penal punishment. On this view personal bail is warrantable. Evidently a person detained as a precaution can procure personal bail. A prisoner, however, is not in a position to pay the bail in cash. In any case, whether the detention in question is treated as punishment or precaution, the ground of acceptance or rejection of bail is the establishment of equality between individuals.

1. (a) *Al Mudawwana-al-Kubra*, Vol.16. p. 14, 17, 18.
   (b) *Al Mabsoot lil Sarakhasi*, Vol.26, p.14,17.18 and 106.
   (c) *Sharh Fathu1Qadeer*, Vol.4, p.117.
   (d) *Nihayat-ul-Muhtaj*, Vol.7, p.284.

(242) Distinguished Members of Society

The Shariah does not allows discrimination between individuals belonging to various sections of the society. It looks upon the ruler and the ruled, the V.I.P.s and the vulgar, the strong and the weak the renowned and the obscure as equal. Once the Prophet was admonished by Allah for giving prominent people preference to a poor and blind man called Ibne Umm Maktoom who had come to the Prophet to enquire the divine injunction about something. The Prophet paid no heed to him as he was then talking to the leaders and elders of the Quresh, preaching them the faith of Allah. Ibne Umm Maktoom interrupted the Prophet's conversation, and the latter frowned and turned away from him without answering his question, and went on preaching the leaders of the nation. This occasioned the revelation of the following verses of the Holy Quran:

> "He frowned and turned away because the blind man came to him. What could inform thee but that he might grow (in grace); or take heed and so the reminder might avail him? As for him who thinketh himself independent, unto him thou payest regard. Yet it is not thy concern if he grow not (in grace). But as for him who cometh unto thee with earnest purpose and hath fear for him thou art distracted."
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> (80:1-10)

The Holy Prophet was exceedingly eager to ensure complete enforcement of the principle of equality and do away with all kinds of disparities. He applied this principle even to a noble women of the Quresh who committed larceny. The people indulged in idle talk about the Prophet's intention to cut off the woman's hand. They regarded the case as momentous. The Prophet having reviewed the situation, addressed the people in the following words:

> "You folk are talking too much about applying Allah's *hud* to one of His bondswomen. By God; if Fatima, the daughter of Muhammad (S.A.W.) had been involved in a similar

case I would not have hesitated in the least to cut off her hand too."[1]

Once a slave quarrelled with Hazrat Abd-ul-Rehman bin Ouf, a great companion of the Holy Prophet (S.A.W.) and complained to the Prophet against him, which angered Hazrat Ibne Ouf. He called the slave, 'the son of a black woman'. On hearing his remark the Prophet (S.A.W.) was enraged. He raised his hand and exclaimed, "No son of white woman is superior to a son of black woman, except in respect of truth!"

Hazrat Ibne Ouf was ashamed of his treatment of the slave. He thought of apologizing to him in a manner that humiliated himself. So he put his cheek on the ground and asked the slave to trample it so that he may be consoled.

The incident relating to Jiballah bin Acham is well known. He was performing *towaf* around the House of Allah. Per chance a villager set foot on the fringe of his cloak. Enraged as he was, he slapped the poor fellow. The rustic complained of this to the Caliph Hazrat 'Umar, who ordered retaliation. A Chieftain like Jiballah could not withstand the indignity he had to suffer at the hands of a rustic and fled to Rome where he was converted to Christianity. But later he repented and wrote the following couplet.

Noble who turned a Christian
because of a slap from a rustic
What was the harm if thou
hadst withstood the slap!

Hazrat 'Umar (R.A.A.) was earnestly desirous of enforcing the principle of equality meticulously and we have many traditions to this effect.

In short, the principle of equality as laid down by the Shariah does not admit of any consideration of the personality, status and economic position of the affected person in the determination of compensation. It is rather assessed on the basis of the offence and the outcome thereof. Thus, according to the Shariah the compensation payable to an ordinary person and dignitary is equal. Hence if two such persons are victims of the same accident, losing the same limb, they will get equal compensation.

1. Imam Abu Yousuf-Kitabul Kharaj, p. 50.

The provisions of Shariah are equally applicable to a Muslim and a Zimmi in matters wherein they are equal but where they are differently placed, the enforcement of the principle of equality will be wrongful to the Zimmies. The difference between them consists in their religious belief. For this reason there can be no equality in this respect, inasmuch as maintenance in two identical matters is pure justice but will be sheer injustice in two different matters. Thus in application of the principle of inequality in dissimilar matters cannot be treated as exemption from the principle of equality. It rather strengthens and supports the principle of equality; for the very purpose of equality is justice and the demands of justice cannot be met by enforcing the principle of equality between the Muslims and Zimmies in religious affairs. Equality in such affairs would amount to allowing Muslims the freedom of practising their faith and denying this freedom to the Zimmies. It would also mean that no exception is taken to the belief of the Muslims while the beliefs of the Zimmies are called into question and that the latter are coerced into the observance of that which does not accord with their belief. Thus it would be tantamount to the infringement of the injunctions of Shariah which provide for the religious freedom of the Zimmies. In fact, equality in religious matters is defiance of the divine decree that "There is no compulsion in religion." (2:256)

Criminal cases wherein the Shariah treats the Muslims and Zimmies on different footing involve such offences as are exclusively grounded in religious belief; for example, eating of swine's flesh and drinking of liquor. Under the Shariah drinking of liquor and eating of swine's flesh is unlawful. Thus justice demands that this prohibition should be applied to the Muslims only, since they do believe in their unlawfulness. But to apply it to the non-Muslims who do not regard these things as unlawful would be wrongful, inasmuch as enforcement of absolute equality would make non-Muslims accountable for acts that are not forbidden by their religion, and therefore it would be tantamount to sheer injustice. Hence to meet the demands of justice the Shariah confines the above prohibition to the Muslims. In other words, if a Muslim partakes of swine's flesh or drinks liquor, he will be punished

but if a Zimmi does it, he will not be deemed to have committed any offence.

However, 'Zimmies will be punished for an act which is unlawful according to their religion as well, or treated as outrageous or the commission whereof is subversive or bars on the moral sense of others. For instance drinking of liquor is not unlawful with the Zimmies but being drunk is unlawful or is at least vicious. Moreover, it subverts public morals. The Zimmies, therefore, are not liable to punishment for simply drinking liquor. They will rather be punished for being drunk or intoxicated. Thus if anyone drinks it to be intoxicated will be punished. But if any Zimmie drinks it without being intoxicated he will not be called to account.

According to the Shariah fasting during the month of Ramazan is one of the essential duties of the Muslims and failure to fast is an offence. Eating and drinking openly is also an offence. But only the Muslims are liable to punishment for failing to keep fast, because fasting is enjoined on them to the exclusion non-Muslims who do not believe in fasting at all. Punishment of a non-Muslim for not keeping fast will, therefore, be sheer injustice and will amount to compulsion to do something in which he has no faith. This would infringe the Quranic injunction that there is no coercion in religion. But a Muslim and Zimmie will be equally liable to punishment for openly eating and drinking in the holy month of Ramazan. The reason for this is that the Zimmi undertakes to abide by the injunctions of the Shariah and it is therefore incumbent upon him to abstain from aught prejudicial to the Islamic taboos and outrageous to the sentiments of the Muslims. Since eating and drinking openly prejudices the Muslims duty of fasting and the sentiments of the faithful adhering to that duty, a Zimmi will be punished for such an outrageous act. But if he eats and drinks in private, he incurs no punishment because fasting has not been enjoined upon him.

(244) Distinguishing Characteristic of Shariah

It may be inferred from the variable application of the Shariah to the Muslims and Zimmies respectively that crimes are of two categories. General offences that entail punishment for every individual residing in Darul Islam, and specific offences

for which the Muslims are exclusively liable to punishment. Such offences can be committed by only the Muslims as they are grounded in the Islamic faith.

So far as I know there is no man-made modern law which has not adopted the above criterion of the Shariah and has not consequently declared some of the criminal acts general offences and some specific offences for which only certain individuals are punishable. But this division of offences in the modern laws is not rooted in religious beliefs.

The Shariah has adopted the criterion in question in order to ensure justice and complete freedom of beliefs and to strengthen national integrity and solidarity; for according to the Shariah the springs of national solidarity lie in Islam.

The modern laws as a matter of fact need no such criterion since they are generally devoid of religious and moral considerations. According to these laws it is enough to prohibit such things as are detrimental to material relationship of the individuals or to public peace and administrative order. For this reason the modern laws themselves give rise to subversion, anarchy and disorder. They arouse the masses to rebel against the established order. Hence the commotions and revolutions that are so common today that every system under-goes a change after a few days and every new system meets the same fate as the previous one.

The modern legislators have committed a blunder. They wanted to incorporate both the principle of equality, and freedom of expression in the law simultaneously. In order to do this they could not but dispense with religious and ethical elements. Consequently, the law devoid of ethics and religion pose the dangers referred to above. Had they adopted the criterion of the Shariah, not only the principles of equality and freedom of expression would have been endorsed as desired but also the harmful effects thereof would have been avoided.

It may be argued by the modern legislators in defence of their secular stance that prior to the French Revolution all the legislated laws were based on religion and in all of them the religious belief of only the ruling junta was taken into account, completely ignoring the belief of the subjects. Nor is this all. People with belief opposed to those of the rulers were forced and

legally compelled to profess the belief of the latter. This engendered hatred and animosity amongst the individuals of the same nation, resulted in carnage and ruthless genocide. Consequently, the modern legislators were obliged to do away with religion and ethics in the laws framed by them. But the results of this remedy have regretfully been as harmful as the malady itself. To my mind there can be no better remedy than the one offered by the Shariah; for it does not only take into account the principles of equality and the sanctity of belief but also safeguards the spiritual and moral values. It is the respect of these values from which springs the respect of law.

In a comparative study of the modern law and the Islamic Shariah we must not lose sight of the fact that the Shariah is essentially a religious law rooted in Islam and, therefore, it cannot deviate from the Islamic ideal. Moreover, the religion of Islam with all its forms of worship like prayer, fasting, payment of the poor due and Hajj and belief in the unity of Allah as well as commands and prohibitions constitutes a basic political system, which is an indivisible unit and admits of no analysis. Hence it is not possible to accept some of its constituents while rejecting others; for to reject some of them would mean total renunciation. The companions of the Holy Prophet understood fully well the indivisible unity of the system constituted by the Shariah. So after the demise of the Holy Prophet they treated as apostates the people who refused to pay the poor due and waged a *jihad* against them at a time when peace was of vital importance to the Muslims, and when the entire Arabia had taken up arms against them.

At any rate, since the Shariah owes its origin to Islamic ideology and is naturally disposed to preserve and enforce that system, it cannot relinquish punishment for moral and religious offence. In fact it is imperative that the Shariah should declare all such acts unlawful disrupt the Islamic order and provide punishment for those acts.

The distinguishing characteristic of the Shariah we have just dwelt upon is not its flaw or weakness. It is rather an essential ingredient of the system that operates in the world. Every universal system rests on some essentials and pillars without which it is incapable of making any progress. If we blink at the essentials

and the props of any system, man-made and otherwise, it is bound to collapse. The edifice of democratic system stands on its distinctive base and so also do Nazism and Socialism. Each of these systems is distinguished from others by virtue of the essentials that sustain it. Obviously none of them can endure if those essential elements are ignored; for each living system owes its existence to what distinguishes it from others.

Every system mentioned above provides for severe punishment for offences that threaten its existence. Hence if the Shariah enjoins punishment for what jeopardizes its system, it does nothing, unwarranted. What the Shariah does, is indispensable for the existence, growth and continuity of any system. As for the fact that the Shariah enjoins punishment for such acts as are not punishable under the man-made law, it is of no consequence. It is because of the variety and the genius of each system. As every system has a specific purpose and a genius so its own, all the systems cannot be in consonance with one another with regard to what they treat as warrantable and unwarrantable. The man-made systems provide clear examples of this. For instance, socialism regards the propagation of Nazism and democracy as a culpable offence. Similarly democracy is at odds with both socialism and nazisms and democracy as a culpable offence. Similarly democracy is at odds with both socialism and nazism and considers it punishable to propagate these ideologies. In democrat states people are allowed the right to unlimited ownership of private property, but in socialist countries unlimited appropriation of property is an offence. In short prohibition of different acts in different systems is no blemish in itself; for a system is not judged by its criteria of permission and prohibition. The real criterion of its evaluation is the extent to which it benefits mankind and helps in its development and attainment of supremacy; how far it fosters equality, justice and the bonds of fraternity in the society.

Before winding up this discussion I would like to make one thing clear about the Islamic Shariah. Having declared certain acts unlawful, it lays down punishments for them and at the same time confers on the person in authority the power to remit some of the punishments such as penal punishments and to prohibit certain acts he deemed to be detrimental to public interest and

peace. Of such acts more significant are those which are in conflict with the spirit and principle of the Shariah. Thus if the ruler deems it expedient to declare a particular act unlawful he may prohibit it and award punishment for commission thereof. But the ruler enjoys this power subject to the maintenance of public peace and safeguard of collective interest. It may, therefore, be said that in the case of purely religious offences the ruler is not competent to remit punishments; for if such offences entail *huds*, punishment is imperative. But if they consist of penal crimes, then his power to remit punishment is subject to the interest of Islamic system. Hence forgiving of offences cannot always be in the interest of Islamic system.

Moreover, the ruler is under the obligation to declare unlawful and punishable any act deemed to be in conflict with the spirit and general principles thereof. Thus his entire power to prohibit or permit an act is dependent on the interest of Islamic system. The ruler's own interest, and for that matter, the interest of any-one else has nothing to do with it.

Punishment for crimes of religious nature are designed to safeguard Islamic system itself. They have been provided for keeping in view the interest of Islam to the exclusion of any other system. Hence the people who are desirous of enforcing Islamic order cannot object to such punishment and those responsible for the enforcement of Islamic Shariah cannot neglect them.

There is nothing if the Shariah is at variance with man-made law in providing for punishments of religious crimes; for this variance is grounded in the respective genius of every system. Thus is not something for which the Muslims should refrain from preferring the Islamic system to other systems just as the socialists do not refrain from preferring their system to all the systems of the world, in spite of the fact that socialism is opposed to every system whether divine or human that has been in force in the world. In fact socialism is at variance with the scheme of things itself.

We have shown that the Islamic Shariat differentiates between the offences committed on the one hand by the citizens of the state in general and on the other by those committed by the

Muslims. This classification of offences is based on religion. But owing to recent trends in the modern law the discriminate attitude of the Shariah is no longer unfamiliar in the world today; for the modern laws also include some provisions that apply to specific individuals and institutions to the exclusion of others; for instance provisions applicable to judges, lawyers and students. These provisions forbid certain acts for certain individuals and groups and make them liable to punishment. Declaring some specified unlawful and punishable for certain specified individuals and groups in this manner bears close affinity declaration by the Shariah of certain acts unlawful and punishable exclusively for the Muslims. In other words, the modern laws too are obliged for the sake of individual and collective interest to resort to the same measure which the Shariah adopted fifteen hundred years ago for the sake of peace and tranquillity and of common weal.

(245) Does Shariah Discriminate between Muslims and Non-Muslims in Determination of Sentences?

The general rule of the Shariah is that whoever commits an offence shall he punished. Although it differentiates between different groups or communities in respect of prohibition of acts for reasons already explained, yet in the determination of punishments it does not discriminate by declaring a specific group liable to punishment, while exempting others therefrom. Punishments for *hud* crimes are unequivocally prescribed and as such are not amenable to enhancement or commutation by the Qazis. In the case of *qisas* crimes, too, punishments are clearly laid down but they are commutable if the aggrieved person, his heir or guardian relinquishes the punishment or in case if there is any technical hitch under the Shariah to pass the prescribed sentence. If the punishment is not remitted or relinquished or if there is any technical hitch in awarding it, the judge is not empowered to commute the punishment. However, he may in either case award some other punishment. Penal offences generally entail punishment with two limits and its assessment is based on the discretion of the Qazi. He may, keeping in view the circumstances of the case, award the lowest or the highest degree of punishment as he deems fit.

It is evident, then, that the nature of *Shariat* punishments does not admit of discrimination between individuals or Muslims and non-Muslims. Whoever commits an offence will, of necessity, be punished.

However, the jurists differ on the conditions laid for the treatment of the offender and the aggrieved party. It is because of this difference of opinion that the people who have no knowledge of the Shariah and the injunctions deduced by the various schools of jurisprudence, labour under the misapprehension that the Shariah discriminates between Muslims and non-Muslims. There are three offences on which the jurists disagree! wilful murder, adultery and false accusation of adultery.

Punishment provided for wilful murder is *qisas* (retaliation). But the three *Immas* (Malik, Shafi'ee and Ahmed) are of the view that the murder of a Zimmi by a Muslim does not warrant *qisas*. They allude to the following Tradition of the Holy Prophet in support of their contention.

"Let it be clearly understood that no Muslim is to be executed in retaliation for the murder of a Kafir (disbeliever)."

But Imam Abu Hanifa regards *qisas* for the murder of a Zimmi by a Muslim as obligatory. He takes the word 'Kafir' to mean a non-Muslim having no contractual obligations and guarantees and therefore, thinks that the edict of the Holy Prophet does not apply to a Zimmi who is under contractual protection of the state. Here, too Imam Abu Hanifa draws on the authority of the provision enjoining *qisas* as punishment for every murder. The disagreement among the jurists on this point owes itself to the varied construction of the *Shariat* provision and the more correct construction, indubitably, is the one which declares Muslims and Zimmis equal, for it is in harmony with the generality of the provision as well as accords with the principle of equality between two individuals guilty of the same offence.

As regards punishment committed by an unmarried offender, there is no difference of opinion. Thus both the unmarried Muslim and non-Muslim adulterers are liable to flogging alike. However, the jurists differ on the question of punishment for adultery committed by a married person. According to Imam Abu Hanifa, a married person guilty of adultery will not be stoned to death

inasmuch as one of the conditions of *'ehson'* (marriage) is faith in Islam and on this ground a Zimmi cannot be treated as a married person. He will therefore, be invariably liable to flogging. As opposed to a married Zimmi, a married Muslim guilty of adultery will be liable to stoning. But according to the three *Imams* (Malik, Shafi'ee and Ahmed) Islam is no condition of *ehson* (marriage) and, therefore, a Zimmi adulterer will also be stoned likewise. In other words the two groups of major jurists disagree in the interpretation of the term *'ehson'*.

False accusation of adultery presupposes wedlock as is clear from the following divine words:

"Those who traduce virtuous, believing women."

(24:23)

If the word *'ehson'* is interpreted here also to be involving Islam as an essential condition, then false charge of adultery against a Muslim will be punishable by eighty stripes; while the false accuser of a Zimmi will be liable to penal punishment which may include flogging imprisonment or a lesser punishment than *hud* or a more severe exemplary punishment.

It appears from compression of results in the case of all the three crimes discussed above that both the situation and the results thereof are different. If the Muslim is liable to a lesser punishment for murder, the Zimmi is liable to a lighter one for adultery, while the Muslim is liable a harsher punishment. In the case of slander the Zimmi is sometimes comparatively at an advantage and sometimes at a disadvantage. These conclusions, to which we are led by the opinions of the jurists, provide an adequate defence against the erroneous charge that the Shariah allows discrimination between Muslims and non-Muslims. The same conclusions also corroborate our observation that the problem in question has arisen out of the varied interpretation of relevant provisions. It has nothing to do with the question that the *Shariat* favours one group of citizens against another in respect of punishments.

(246) Applicability of Provisions to Different Persons

It is clear from the foregoing discussion that the provisions of Shariah are applicable to all persons alike regardless of disparities

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(246) Applicability of Provisions to Different Persons

It is clear from the foregoing discussion that the provisions of Shariah are applicable to all persons alike regardless of disparities

in their status, financial position, material possession and similar differences. The Shariah enforces equality under all circumstances and does not allow preference of one individual, group or institution to another.

In view of the *Shariat* principle of equality and the criminal provisions thereof it may be claimed that the Islamic law is superior to and much loftier than the man-made law. The human law with all its sophisticated doctrines cannot stand compression with the Shariah in the matter of equality before law. Anyone with a severe of justice who acquaints himself with the above comparative assessment would acknowledge that the principle of equality as contained in the *Shariat* is by the lofliest and most consummate. As compared to it, the man-made law is like an infant who is yet at the stage of learning to walk with the help of its knees and cannot stand erect firmly for a while.

Chapter V

The Material Element of Crime

(247) Method of Treatment

The material element of crime comes into being when the prohibited act has been completed whether the act is positive or negative. If the offender, while committing a crime, completes the prohibited act, he is guilty of the crime in full, for instance, he may, in course of committing-larceny, get away with the stolen property from a safe place. But a prohibited act is said to be an attempted crime in modern legal terminology, when the offender is not able to complete it; for example when he is caught before coming out with the property or immediately after entering the place where the valuables are kept.

Another point worthy of note in the commission of a crime is that sometimes it is committed by a single individual and sometimes there is a group of accomplices abetting him. One or a few of the group complete the criminal act or some of them incite the culprits to commit it while some extend them a helping hand. This cooperation and abetment in the accomplishment of a criminal act is termed as complicity.

In other words, treatment of the material element of crime involves a discussion of completion of an offence, attempted commission thereof and complicity therein. Discussion of completed offence forms a special part of the present work where every offence will be dwelt upon separately, dealing with its completion, conditions and punishments; for this reason we have drawn a line of distinction between general and specific offences.

We proceed for the present to deal with attempted offence and complicity therein under separate sections.

Section I

Attempted Offence

(248) Jurists' Position with Regard to Attempted Offence

The jurists of Islam have not prescribed any principle with regard to attempted offence. In fact they are absolutely unaware of the meaning of attempted offence as we know it today. However, they do differentiate between a completed offence and an abortive offence. There seem to be two reasons for not prescribing any principle in this respect.

(a) Whatever the kind of offence, no punishment of *hud* or *qisas* is awarded for attempting it. The punishment generally awarded for it is a penal one.[1]

The approach of the jurists on this subject has been to attach more importance to the *hud* and *qisas* offence in as much as they are predetermined and their conditions and constituents are invariable. Punishments for them are also prescribed leaving no option for the judge to increase or reduce them. Whereas in the case of penal offences we see that barring a few exceptions, whereabout provisions do exists such as prohibition of carrion and breach of trust most of them are left to the discretion of the rulers who have been empowered to determine such offences and provide for whatever punishments they deem fit if they are prejudicial to public interest and peace and to leave such cases wherein, they do not consider it necessary to award any punishment. They also enjoy the power to limit penal offences, whether they constitute criminal acts prohibited under the provisions of the Shariah or by the person in authority. Again, in the case of penal

1. *Qisas* is incurred in attempted murder when it results in injury or in the dismemberment of the victim's limb. But punishment in such a case does not constitute the penalty of attempted murder itself. It is a punishment for causing injury or dismembering the limb which in themselves are treated as offences. Details hereof will be discussed in the requel.

offences the person in authority is competent to prescribe a more severe punishment in public interest. Moreover, the Qazi enjoys wide powers in respect of such offences. Thus he may award either maximum or minimum of the same punishment. In short penal offences are less important than the *hud* and *qisas* crimes and punishments for them too, are not fixed. Sometimes light punishments are awarded and at others most severe sentences are passed. Besides most of the penal offences are such that punishments for them are awarded only once and that they are punishable at one place and not punishable at another place. A change in the standpoint of the ruler would effect a corresponding change in the constituents of the offences in question. For this reason the jurists of Islam have discussed only penal offences in a general way, without touching their elements conditions and other details. On the same ground they have left out a separate discussion of attempted offence as it belongs to the category of penal crimes.

(b) The jurists have not bothered to prescribe rules for attempted crime in view of the principle of Shariah pertaining to the punishment of penal offences; for this principle in itself constitutes sufficient basis for deciding the case of attempted offence. According to the said principle penal punishment is to be awarded for every offence that does not entail a *hud* or expiation. In other words, any act which the Shariah declares to be an offence but for which it does not prescribe any *hud* or expiation involves penal punishment. As the penalty of *hud* or expiation is awarded for a determined offence which the offender may have committed in full, penal punishment will be awarded for attempting every prohibited act and for this purpose every such attempted act will be treated as an offence fully committed, even if it constitutes part of the series of acts that go to make up a complete offence, provided that the part of offence committed by the offender is in itself a forbidden act. It is also possible that an act constituting a determined offence assumes the character of a crime of quite a different nature when committed along with another act. Thus if a burgler makes a hole in the wall of a house but is caught before entering it, he will be guilty of a culpable act which in itself amounts to the commission of a complete crime, although his act is attempted larceny at the same time. Similarly if a thief

steals into a house with the intention of committing larceny he will be guilty of an offence as he will be when he does not break or stealthily enters into a house but simply goes into it in an ordinary way with the intention of stealing. Again he will likewise be guilty of an offence when he enters a house with permission, collects valuables therein with the intention of stealing but is caught before getting away with them. In any case if a thief commits an act forbidden by the Shariah, he will be guilty of an offence; In other words, if we look at it in isolation, the act committed by him is punishable, although it may be a part of an unfinished offence. Now if the offender completes all such acts as comprise larceny and succeed in bringing out stolen things from the safe place where they are kept, all those acts will together make up thc offence of larceny. No sooner is this offence completed, than he will be liable to the punishment of *hud* laid down for larceny and will cease to be amenable to penal punishment; The reason for this being that the combination of all the prohibited acts would give rise to the complete offence of larceny.

If an adulterer enters the house of a woman with the intention of committing adultery and sits with her in private, he will be guilty of an offence. He will also be guilty if he kisses and embraces the woman. All these acts constitute attempted offence of adultery not committed in full. But each one of them entails penal punishment. When all these acts culminate in coition, the prescribed *hud* will come into operation, inhibiting penal punishment, for all such acts including coition constitute a complete crime which is adultery.

From the foregoing statement it is, at any rate, clear that the jurists of Islam could not find any *raison d'etre* of prescribing a separate principle for attempted crime. They have nevertheless, differentiated between complete and abortive offences entailing *huds* or *qisas,* inasmuch as these punishments become obligatory when the crime is fully committed. In case of an abortive offence, penal punishment is awarded and not *hud* or *qisas.*

It would be wrong to declare that the Shariah is not familiar with the concept of attempted crime. On the contrary it is fully acquainted with it. The only difference is that instead of dealing with it in a novel manner as the modern law does, it tackles the

problem of attempted crime in its own peculiar way. The jurists of Islam as a matter of fact do not treat an unfinished criminal act as an attempted offence because all such unfinished acts that become crime comprise penal offences and are as substantive in themselves. It is needless to characterise an offence of this kind as an attempted offence, because the offence originally intended could not take place. The reason for this is that the committed act which constitutes part of the intended offence in itself is a complete crime. If all such acts have been termed today as attempted offences nothing new has been introduced. All that has been done is that new nomenclature has been adopted to describe certain offences to mark them off from other penal offences, although there was no need for such a nomenclature and differentiation. We felt it necessary to elucidate the real position regarding attempted offences in order to bring it home to the reader and compare the concept of the Islamic *Shariat* to the doctrine of the modern law.

The scope of the *Shariat* concept of attempted crime is much wider than that of the modern law. The *Shariat* provides for punishment for every abostive intended offence and there is no exception to this rule. Thus if a man raises a stick to strike another man but a third person intervenes to prevent the offender to strike the victim, the aggressor will be guilty of an offence and liable to penal punishment. Again a man fires a shot at another man but misses, he will, according to the Islamic law, be guilty of an offence and, therefore, liable to punishment; whereas the modern law provides punishment for some offences to the exclusion of others and does not contain any definite rule pertaining to this matter.

Notice how the *Shariat* doctrine applies in a rather peculiar case. If a man injures another person with the intention of killing him and the victim later succumbs to injury his act would be treated as wilful murder. But if the wounded person recovers, the assault on him would be regarded just as an offence of inflicting wound and the offender will consequently be awarded penal punishment. Again, if the offender intended to kill someone but could not succeed, his act would be a penal offence punishable by penal punishment.

(249) Stages of a Criminal Act and the Punishable Phase

The offender passes through various stages before he commits an offence. First of all he thinks of offence and then resolves to commit it. This stage is followed by preparation for the offence and procurement of instruments and necessary means for committing it; for instance buying weapon of offence for murder, getting hold of instrument for breaking the wall of the house wherein larceny is to be committed or buying a key which may open the locks of the door. When the offender acquires all these accessories; he moves ahead into the third stage of putting his plan into operation. He does it as he thinks fit and translates his plan into action.

These, then, are the three stages through which the offender passes in the commitment of an offence. Which of these stages constitutes culpable offence? Answer to this question is as follows:

(a) Thinking and deciding is not a punishable offence. According to the Shariah, no man is accountable for whatever ideas come into his mind, whatever acts he thinks of doing or whatever he intends to say or do, for the Holy Prophet has said:

> "Allah has forgiven the people belonging to my *Ummah* for the notions coming into their minds unless they utter them or put them into practice."

In short one is accountable for one's word and deed and not for one's thought and resolution.

This is one of the fundamental principles of the Shariah which it embodies right from the day of its revelation. It is the very principle found in all the modern laws. But it was introduced into them only at the end of the eighteenth century after the French Revolution. Before that if a mere criminal notion or intention could be proved, the offender was liable to punishment. Thus the Shariah takes precedence of legislated laws in containing this principle. The man-made law has adopted the *Shariat* principle hundreds of years after it had been provided for originally. Besides, it should be borne in mind that the principle as provided for in the *Shariah* admits of no exemptions; whereas modern laws do contain exemptions. The Egyptian and the French laws, for example, distinguish between premeditated murder and unpremeditated wilful murder. In former case punishment and in the latter lighter punishment has been provided for.

(b) **Acquisition of Accessories**

The stage of acquiring accessories for committing an offence, too, does not comprise a culpable act. The Shariah provides no punishment for preparation for an offence by procuring means necessary to commit it unless of course, procurement or production of such means in itself is a crime. For example, if a Muslim intends to commit larceny by drugging somebody or getting him drunk, his procurement of an intoxicant and keeping such a prohibited thing in itself would be a punishable offence. Punishment for such an offence does not hinge upon the realization of the basic objective, viz.; commission of intended larceny.

The reason for excluding the procurement of the means required to commit an offence from punishable act is that only acts constituting crimes entail punishment. An act assumes the character of a crime only when it results in the violation of the right of God or right of the people. There is apparently nothing in the acquisition of accessories in preparation for the commission of a crime that may be tantamount to a violation of such rights. Even if these acts involve an element of transgression, such a transgression is amenable to construction and open to doubt; whereas the Shariah treats only those acts as punishable which are unmistakable crimes and whose criminality is unambiguous.

(c) **Stage of Commitment**

This is the stage at which the acts of an offender turn into offences. An act is treated as an offence when it constitutes a crime; i.e. it transgresses the right of an individual or the community. It is not necessary that such an act should be the commencement of the material element of the crime in question. It is enough that the act in question is an offence in itself and the object thereof is to translate the material element of a crime into action, even if there still remain many a step between the complete commission of the material element and actual act, as for example breaking the wall of a house in larceny or stealing into the house by breaking the door or opening the lock thereof with a false key.

Each one of these acts is both attempted larceny and an offence in itself although many steps remain to be taken in order that the act may culminate in the crime of larceny. In short if the offender breaks the wall, opens the door or steals into the house he will be liable to punishment for committing an offence or for attempted larceny although the real object of the offence is not achieved.

Similarly, if a man goes into the house of a woman with the intention of committing adultery, sits with her in private, kisses and embraces her and does any other act involved in the case of adultery he will commit an offence, and will be treated as guilty of attempted adultery and liable to penal punishment. He will be punished for each one of the above act, although there still remain many acts to complete the material element of adultery.

However Abu Abdullah Zuberi holds that a thief should be punished for committing an offence or attempted larceny when he is found near the house wherein he intends to commit theft having with him the requisite instruments to open the lock and break the wall, although he may not have broken the wall or open the lock as yet. The same jurist is also of the view that the offender would be punished when he is caught lying in wait for the chowkidar to relax so that he may be able to steal the valuables guarded by the Chowkidar.[1]

The criterion of punishment in the case of an attempted offence is that the act committed by the offender constitutes an offence; as for example, the act of breaking the wall. In order to find out whether or not an act amounts to a crime, the offender's motive is to be ascertained, inasmuch as the proof of the motive will dispel any doubt that may arise about the criminality of the act and delimit the nature of the offence it constitutes. Abu Abdullah Zuberi has laid great stress in the above examples on the motive or the intention of the offender. To lie in wait near the place where theft is committed may be designed to do something lawful. But the element of doubt will be eliminated from the motive of the criminal and the nature of offence will be determined. When the offender is found with necessary instruments for breaking into the house, there will be two possibilities: he intends either to commit larceny or do something lawful. But the real motive

1 *Al Ahkamul Sultania,* 206,207.

of the offender, when ascertained, would remove the element of doubt in his act and determine the nature of offence.

(250) Comparison between Shariah and Man-made Law

Modern laws are in agreement with the Shariah insofar as they do not admit of punishment at the stage of meditation and procurement of instruments, but confine punishment to the stage of actual commission. But the experts of manmade law differ on the question as to the initial phase of actual commission.

The jurists of the materialist school hold that the initial phase of the material act constituting crime is the beginning of the commission thereof. If the crime constitutes a single act, then the initiation of that act is the beginning of the commission of the crime in question. But if it comprises many acts, then the initiation of anyone of them is the beginning of the commission of the crime and not act other than one forming a part of the crime will be reckoned as the initial phase of the commission thereof.

On the other hand, the personalist jurists are of the opinion that to attempt an offence or commencement of any act. is enough, which precedes the commission of material element of the crime and which necessarily leads to the commission thereof. These jurists try to determine the motive underlying a crime on the basis of the offender's personality.

The position of the personalist school of modern legal thought is closer to the Islamic *Shariat.* The *Shariat* also enjoins punishment for the act which may be punishable according to this school. But the scope of the shariah is wider than the view advocated by the personalists; for the shariah enjoins punishment for every offence, whether or not the offence leads to the commission of the material element of the crime intended; for instance, breaking the wall or opening the lock with a false key. The Egyptian law follows the personalist doctrine and the judgments of the Egyptian high court are also based thereupon.

(251) Punishment in the Initial Phase

One of the principles laid down by the Shariah as to the *hud* and *qisas* offences is that the punishment for attempted offences

should not be the same as that prescribed for completed offences. This principle is based on the following edict of the Holy Prophet.

"Whosoever awards punishment for an uncommitted crime is an oppressor."[1]

In cases of *hud* and *qisas* offences it is not possible to infringe this principle. You cannot award full punishments of flogging and stoning for attempted adultery, nor can you amputate the hand of a thief for attempted larceny; for if you sentence him to the amputation of hand you will bc punishing him for completed offence although he is guilty of only a part thereof. Obviously there is a difference between an attempted act and a completed act. The offender should be called to account only to the extent that he commits the criminal act and should be punished in proportion as he is guilty.

Another point to be taken into consideration in this respect is that if the offender is awarded punishment for an attempted offence equal to that of completed offence he will be encouraged to commit it in full; for he will think that if he is to get full punishment for simply attempting offence, why not complete it. Thus by awarding full punishment you block for him the alternate course of desisting from the offence.[2]

Penal offences may also be considered on the analogy of the *hud* and *qisas* offences, which will be subject to the same rules as the latter, although they are specifically meant for offences entailing *huds* and *qisas*. As there are major crimes, the rules made for them would obviously be applicable to lesser offences.

You may, if you like, confine the application of the Prophet's edict cited above to prescribed punishments, i.e. to the *hud* and *qisas* offences. In fact, the wordings of the tradition themselves warrant such restricted application

Here the term *hud* has been used in two different senses. The *'hud'* occurring first in this text means punishment, while the one followed by it implies offence. Thus the relevance of the injunction is unmistakable. It applies exclusively to offences entailing *hud* and *qisas*. Hence in the case of offences other than

1. The *hud* and *qisas* offences are treated a *hud* themselves and a *hud* means prescribed punishment for an offence.
2. See article 481.

huds it will not be warrantable to award for attempted offences such punishments as are prescribed for completed offences; for penal punishments are unprescribed and the courts are vested with wide powers to award lower or higher limits of such punishments as they deem fit.

As for the modern laws, some of them lay down punishment for attempted offences equal to that provided for completed offences while some provide for lighter punishments.

(252) Evasion of Offence

When an offender begins indulging in a crime, he sometimes completes and sometimes leaves it unfinished. If he completes it, he will of course, be liable to punishment. But if he abandons it, on account of being caught redhanded in the course of collecting the stolen things or leaves it unfinished of his own accord, his evasion of the offence is not the result of repentance. He evades it because he thinks that the extent; to which he has committed is sufficient or realizes that he lacks the requisite instruments; or makes up his mind to complete it in due course; or fears lest he should be seen. His evasion may also be result of repentence, feeling of remorse and turning to Allah in all humility.

If the reason for non-completion of offence is compulsion, for instance, his being caught by the aggrieved party or is constrained by some unexpected development his accountability will not be affected by his abstinence from the offence provided that the extent to which he proceeds in the act constitutes an offence.

An offender will be accountable for an attempted crime if he desists from finishing it for reasons other than repentence; but the act which he may have already committed in itself constitutes an offence violating the right of an individual or the community for instance, somebody breaks the door or wall of a house with the intention of committing larceny therein but cannot enter it for fear of being caught as the chowkidar, then, happens to be patrolling the premises; or manages to get into the house but is unable to open the safe and comes out to fetch someone else to help him in opening the safe and carrying the stolen things. In all these cases the offender will be punished in spite of the fact that

he abandons the offence unfinished, inasmuch as he does not evade the commission of the crime in full, as the result of repentance and the extent to which he is guilty of it constitutes an offence in itself. Thus trespassing a premises breaking the wall or door of a house is an offence. However, if somebody goes only as far as the door of a house with the intention of committing theft but returns, evading the intended offence, he will not be liable to punishment; for his act does not violate the right of an individual or the right of the community.

(253) Abstinence from Crime after Repentance

In the case of a sanguinary offence the offender will not be punished for whatever he may have been guilty of in the course of committing the offence, if the cause of his discontinuance thereof is repentance and return to the path of Allah. The divine injunction to this effect is as follows :-

> "Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful." (5:34)

If the assailant repents before he is overpowered, the punishment he is liable to will be annulled, even though he may have completed the offence. It goes without saying that if punishment for a sanguinary offence homicide committed in full is annulled by repentance, then the punishment for an abortive offence will be all the more amenable to annulment. All the jurists are agreed that punishment is invalidated by repentance,[1] provided that the offender repents before he is overpowered. However, the jurists differ on the effects of repentance in the case of offences other than sanguinary crimes. Three different views are advocated in this respect.

(1) Some of the jurists belonging to the Shafi'ee and Malikee schools hold that punishment is annulled by repentence.

1. The consensus of the jurists is that repentance annuls only punishments for those offences which prejudice the rights of the community. It does not annul punishment of offences violating the rights of the individuals. Thus if the assailant snatches away the belongings of someone and then repents, the punishment to which he is liable will be annulled, but he will have, of necessity, return the things he may have grabbed. Again if he grabs the things as well as kills the owner but subsequently repents, then the punishment of homicide prescribed as *hud* will be invalidated by repentance, but restoration of property to the owner's heirs as well as *qisas* will be obligatory. The punishment of *qisas* may be remitted only by the heirs of the victim.

They argue that the Holy Quran declares punishment for sanguinary offences invalidated as the result of repentance. A sanguinary offence is an offence of the highest degree. That being so, argue the above jurists, the punishment for lesser offences will be the more amenable to annulment.

Moreover, the Holy Quran, having laid down the punishment for adultery, adds that it is invalidated by repentance:

> "As for the two of you who are guilty thereof, punish them both. And if they repent and improve, then let them be." (4:16)

Again the Holy Quran prescribes *hud* for the thief with the reservation that:

> "But whoso repenteth after his wrong-doing and amendeth, Lo! Allah will relent toward him." (5:39)

And the Holy Prophet has said:

> "Repentance makes the sinner innocent"

Again, on being informed of Maiz's flight, the Holy Prophet said:

> "Why did you not set him free so that he might have repented and Allah might have forgiven him?"

According to these jurists punishment stands annulled on account of repentance if the offence committed amounts to the violation of Allah's right i.e. if it belongs to that category of crimes which are detrimental to the community, e.g.; adultery and drinking and not those prejudicing the rights of the individuals such as homicide and infliction of bodily injury. Some of these jurists add the condition of the offender's improvement of conduct. Evidently, such a condition calls for waiting in order to verify the veracity of repentance. But there are others who regard repentance alone as sufficient and do not attach to it the string of the offender's moral improvement.

The result of adopting this view would be that if anyone repents and abstains from completing a crime prejudicing the rights of the community the punishment he is liable to would stand invalidated. But if the crime is one which violates the right of an individual, punishment for it will not be annulled by the offender's evasion thereof even such a change in his behaviour is effected by repentance.

(2) On the contrary, Imam Malik, Imam Abu Hanifa and some Shafi'ee and Hambi jurists agree that apart from sanguinary crimes, punishment is not annulled by repentance, as there exists explicit divine commandment to this effect:

"The adulterer and the adulteress, scourge ye each one of them with a hundred stripes." (24:2)

According to this divine decree, the punishment of flogging to the repentance and the unrepentant is alike.

Again, Allah enjoins that:

As for the thief, both male and female cut off their hands." (5:38)

This injunction covers all the offenders committing theft whether they repent or not.

The Holy Prophet ordered Maiz and Ghamidia (who were guilty of fornication) to be stoned. He also ordered the hands of a thief to be cut off, who confessed his offence. He punished these people in spite of the fact that they had come to him for repentance to confess their guilt before him and implored him to apply to them the relevant *huds* so that they might lie purged of their guilts. The Prophet did not only accept their repentance but also made the following observation about the repentant adulteress:-

"The repentance of this woman is such (so pure and genuine) that, if divided, it would suffice seventy residents of Medina."

The above jurists argue that repentance does not nullify punishment because repentance constitutes expiation for the guilt. They do not see any analogy between a culprit guilty of a sanguinary offence and one guilty of any other offence. The reason for this according to them is that an assailant committing a sanguinary offence is not under control and if he repents before being overpowered, the punishment to which he will be liable would be annulled so that he may persuade himself to repent and desist causing disorder on earth. As opposed to such an offender a habitual is always under control and, therefore, there is no reason for the annulment of his punishment on grounds of his repentance. In fact, habituals can be prevented from committing offences only by punishment. Besides if all the punishments are to be

annulled by repentance then punishments would be totally suspended inasmuch as every culprit may claim to have repented.[1]

On this view an offender who repents and refrains from completing an offence for fear of Allah cannot escape punishment.

(3) The exponents of the third view are Ibn-e-Taymaih and his disciple Ibnul Qayim. Both these jurists belong to the Hamblite school of jurisprudence. According to them punishment purges the offender of sin as also does repentance which annuls punishment in the case of offences prejudicing the right of Allah. Thus if the offender repents any of such offences he is guilty of, the punishment to which he is liable will be annulled. But if the offender himself deems punishment necessary in order to get himself purified of the sin and insists on being punished, he will be awarded punishment accordingly.[2]

It may be inferred from the foregoing view that if the offender repents of an offence prejudicial to Allah's right and desists from carrying it on to the end, then punishment entailed by such an offence would be nullified except when the offender himself wants to undergo punishment and also when the offence he embarks upon is one that prejudices the rights of individuals.

According to the principle of man-made laws in force today, repentance of the offender does annul punishment. This principle is in consonance with the doctrine advocated by Imam Malik and other jurists subscribing to his view. But some of the manmade laws such as those in force in Egypt and France, do not provide for any punishment in the case of an offender who leaves the commission of an offence unfinished. This accords with the position of jurists of Islam who hold that repentance invalidates punishment. Some manmade laws such as those of England and India do not rescind the accountability of an offender in the initial phase of the crime even if the offender desists from continuing it to the end.

(254) Initiation of Impossible Crime

The jurists of Islam make no mention of impossible crime.

1. (a) *Sharh-ul-Zurqani*, Vol. 8, p. 110.
   (b) *Bada'e-wal-Sana'e*, Vol.7 p. 96.
   (c) *Asna-al-Matalib*, Vol.4, p. 1956.
2. *Ae'lam-ul-Moqaeen*, Vol.2, pp.197 and 198.

According to the scholars of modern law an impossible crime is one which is impossible to commit for various reasons such as the lack of necessary means and the like. For instance, a person fires a gun to shoot someone but he does not know that the gun is not loaded or its trigger is out of order or that the target does not exist, as for example he fires a shot at someone who is dead without knowing it.

During the last century impossible crime was the subject of discussion amongst the scholars of modern law. Some of them were in favour of awarding punishment at the initial stage of such an offence while others were averse to it. But the position today is that the concept of impossible crime has been replaced by personalist doctrine. Under this doctrine what matters is the purpose of an offence and the danger posed by it. Thus if the purpose of an offender is known and the offender does embark upon the offence, his punishment will be obligatory.

The position of the modern personalists *vis-a-vis* impossible crime bears close affinity to the injunctions of Islamic Shariah, which lays down that if the act committed by an offender constitutes an offence, then his accountability is not nullified by, say, his lack of the requisite means or nonexistence of the object or the impossibility of translating his purpose into action. In fact, under the Shariah the very attempt to do wrong and to commit excess against the aggrieved party amounts to an offence regardless of the fact, whether the aim of the attempt can possibly be realized or not. An attempt at committing excess is tantamount to excess to the prejudice of individuals as well as public peace. If the intention of the offender is divulged and such an intention is translated into an overt act, he is guilty of an offence. If such an act constitutes an offence he will of course, be liable to punishment. But if his act does not prejudice the victim, in effect, or if it is impossible to commit the intended crime the court may award him appropriate punishment at its discretion in consideration of his intention, the danger posed by the offence and the extent to which it is actually committed.

1. *Sharh-ul-Kabeer*, Vol. 9. P. 340. *Al Muhazzab* Vol. 2, P. 188.
2. See articles 11-12.

Section II

Complicity

(255) Forms of Complicity

Sometimes an offence is committed by a single individual and sometimes many persons participate in it or co-operate with one another to commit it. There are four forms of complicity or participation or co-operation in a crime. Some times the offender shares the commission of the material part of a crime with some-one else: sometimes he agrees in the commission thereof with his accomplices. Sometimes he incites the accomplice to commit the crime and sometimes he abets the accomplice in the commitment of the crime by various means without taking active part in the commission of the material part thereof. In everyone of the above forms of complicity, he shall be deemed to have been involved in the crime, whether or not he has a tangible and active share in the commission of the material part of the crime.

In order to differentiative between one who actually participates in the commission of the material part of a crime and one who does not, the former is called the direct accomplice and the latter indirect accomplice. Similarly the act of the direct accomplice is termed as direct complicity and the act of the indirect accomplice or one having a share in the cause of crime is termed as indirect complicity. This distinction is based on the fact that the direct accomplice directly shares the material part of the crime, while the indirect accomplice has a share in the cause of the crime incidentally or because of incitation or through cooperation, but he does not participate directly in the commission of the material part thereof. That is why he just has share in the cause of the crime.[1]

1. *Shark-ul-Zurqani*, Vol.8, p.10.

Thus differentiated, the specious affinity between the two kinds of accomplices is done away with, which arises out of their identical nomenclature. Apart from the question as to who is a direct participant in the commission of the real crime and who is not, the Egyptian scholars of law in particular are frequently confronted with the problem arising out of such specious affinity, since these scholars use the term accomplice for both the direct participant and the indirect participant.

(256) Relative Importance of Direct and Indirect Complicity

The jurists of Islam have taken great care in adumberating the injunction relating to the main agent of an offence but have exhibited as much indifference in the exposition of injunctions with regard to indirect complicity or participation in the cause of an offence. There are two reasons for this attitude:—

(a) As has already been stated,[1] the jurists of Islam have focussed full attention on the exposition of injunctions pertaining to such offences whose punishments have been prescribed by the Shariah; for instance, offences entailing *qisas* and diyat, inasmuch as these offences are fixed and admit of no change or modification. Their punishments, too, are predetermined and as such are not amenable to commutation. As opposed to these offences penal crimes have received little attention of the jurists. They have not laid down any specific injunctions about such crimes. The reason for this is that crimes entailing penal punishments are not fixed and are, therefore, likely to vary considerably with time, space and standpoints. Moreover, their punishments being unfixed are amenable to diminution or enhancement.

(b) A general rule of the Shariah is that the prescribed punishments are applied to the agent who directly commits an offence and not to one who simply has as share in the cause of the commission thereof. Imam Abu Hanifa applies this rule in a very subtle manner whereas other jurists exempt therefrom such crimes as involve loss of life and corporal injury i.e. homicide and infliction of wound. These jurists argue that crimes are either the result of direct commitment or stem out of participation in the cause thereof. If the principle under discussion is exclusively

1. See Article 248, Vol.8 p.10.

applied to the direct accomplice, the indirect accomplice shall not be liable to the *hud* or the prescribed punishment, notwithstanding the fact that the latter accomplished the material part of the crime just as the direct accomplice does. According to these jurists the associates of the main culprit are exempt from the above rule and the rule applies to one who has a share in the cause of the crime.

A corollary that may be drawn from the above principle is that if the crime, in the cause whereof a person has a share, is one whose punishment is prescribed by the Shariah, such a person will not be liable to the punishment so prescribed, since *hud* (prescribed punishment) is applicable to the direct accomplice as opposed to the offender with complicity in the cause of the crime; for complicity in the cause falls under the category of penal offences, whether the person guilty of such complicity is involved in a *hud* or *qisas* offence or in a penal crime. At any rate, it is clear why the jurists of Islam attach great importance to direct complicity while over-looking complicity in the cause of an offence. Thus if the direct agent commits *hud* and *qisas* offences, he will be liable to these prescribed punishments; whereas one with complicity in the cause of such an offence will not be liable to them. He will rather lie awarded penal punishment. Looked at thus, his offence constitutes a penal crime in all circumstances, although he may have complicity in offences entailing *huds* and *qisas*.

Nevertheless, the jurists have not totally ignored the participation of indirect accomplice. They do discuss it in the course of dealing with offences involving homicide and bodily injury; for such offences may be committed directly or may be brought about by complicity in the causes thereof. Complicity of one other than the agent is actually a kind of the cause of crime. Whatever the jurists observe about complicity in the cause of a crime in the course of a discussion of homicide and infliction of wounds, although brief, is quite enough to deduce the general rules whereon the injunctions laid down by the jurists as to complicity in such offences are based. You will also see in the sequel that the rules referred to are not, on the whole, much

different from the principles relating to casual complicity, as laid down in the man-made laws in force.

(257) General Conditions of Complicity

There are two general conditions of complicity, which must be present in order to treat complicity as an offence:-

(a) Number of offenders should be more than one. Without plurality of offenders, there can be no complicity, direct or indirect.

(b) The act attributed to the offenders must constitute a prohibited and punishable act. If such an act is not punishable it is no offence and participation therein is not complicity.

A

Direct Complicity

(258) Role of Direct Accomplices

This sort of complicity consists in the commission of the essential part of an offence by several individuals. Such complicity is known in modern legal terminology as the plurality of accomplices. In other words, it consists in the participation of others besides the main culprit. But the jurists of Islam mix up with it some forms of indirect complicity and laid down injunctions for all of them taken together. Thus an indirect accomplice does not commit the essential part of an offence of his own accord but in the following cases he too is treated as a culprit sharing the essential part of the offence.

(a) A person may commit an offence all alone or commit it along with some other person

For instance, a person who murders a man and steals all his belongings is guilty of both homicide and theft. But if two or three other persons join him is committing murder by firing simultaneously at the victim then all of them will be guilty of homicide. Similarly, if two or three persons join in stealing valuables from a safe place, they will all be committing larceny.

(b) Accountability in cases of agreement and concurrence

Most of the jurists of Islam distinguish between accountability for crimes committed in agreement or unison and that for crimes

committed with concurrence. In the commission of a crime in unison, the accomplices are severally accountable for their respective roles, each for his own part to the exclusion of the acts committed by his associates. For instance, two persons, agree to kill a man and attack him with their swords. The first assailant chops off his hand and the second beheads him. The former in this case will be accountable to the extent of cutting the victims hand, while the latter for decapacitation. Thus the first is responsible only for the amputation of hand and the second for homicide. But in the case of pre-meditated concurrence all the accomplices will have to account for the offence jointly committed by them.

Agreement in this particular context mean that several accomplices are inclined towards the commission of the same offence. But no plan is prepared before hand and it is agreed among them that each accomplice does whatever he feels and thinks necessary. For instance, a brawl starts all of a sudden. It is not pre-meditated. The people who get themselves involved rush to the spot impelled by emotions and assemble there deciding on the spur of the moment what to do. In such an event it may be said of the accomplices to be in agreement, but they will not be responsible for one another's acts; nor will any of them bear the responsibility of the consequences for the acts committed by others.

As distinct from unison, pre-meditated concurrence means that the accomplices work out a plan before hand which they agree to carry out and are desirous of achieving the object in view before committing the pre-meditated offence. When the time for the real event comes, they move ahead to cooperate with each other. For example, two persons agree on the programme of killing somebody and arrive at the spot to translate the programme into action. One of them cuts of a finger of the victims hand and the other butchers him. In such a case both the accomplices will be regarded as concurrent and both of them will be accountable for the offence.

Imam Abu Hanifa, however, does not differentiate between agreement and concurrence. According to him the same injunction is applicable to both the cases that is each accomplice is accountable

or responsible for his own part in the crime.[1] But all the other Imams differentiate between agreement and concurrence as explained above.[2] Some jurists of the Shaf'ite and Hamblite Schools nevertheless prefer the view advocated by Imam Abu Hanifa.[3]

When will an offender be treated as a direct accomplice? When an offender commits an act which may be deemed the initiation of a crime, he will be treated as a direct accomplice. He will also be treated as such when he does a criminal act with the intention of committing an offence. In short, the modern view is that whenever the offender initiates the commission of a crime, he will become an accomplice of the culprits committing the same crime, whether the crime is completed or not. His complicity is not affected by the completion or non-completion of the intended offence. The effect of its completion or non-completion is confined to punishment alone. If a *hud* offence is completed, the offender will be liable to the punishment of *hud*. If such an offence is abortive, penal punishment will be awarded. As for penal offences the punishment awarded will be penal, whether the offence is completed or not.

As we have already pointed out, the position of the Islamic Shariah with regard to the initiation of an offence, is the same as that of modern personalist.[4] The personalist doctrine is common in all the modern laws and most of the legal scholars subscribe to it. We would like to add here that the position of the Islamic Shariah vis-a-vis direct complicity is based on the same principle as the modern doctrine relating to attempted offence. For this reason the Islamic Shariah is in harmony with most of the modern laws including the Egyptian law.

1. (a) *Al Zaila'ee*, Vol.6, p.114.
   (b) *Al Bahrul Raiq* Vol.8, p. 310.
2. (a) *Sharah-ul-Durdeer*, Vol.4 p. 217 and 218
   (b) *Nihayat-ul-Muhtaj*, Vol.7, p. 261 and p. 263
   (c) *Tuhfatul Muhtaj*, Vol. 4. p. 14 and 15.
   (d) *Hashi-a-tul Bujerini Ala Minhaj*, Vol. 4, p. 40.
   (e) *Al Iqna*, Vol. 4, p.17
3. (a) *Al Mughni*, Vol.9 p. 366.
   (b) *Al Sharhul Kabeer*, Vol.9 p. 335
   (c) *Al Muhazzab*, Vol. P. 716.
4. Please See Article 250.

(c) If the person committing the actual offence directly serves as a tool in the hands of the accomplice and the latter uses him as he chooses, the accomplice having a direct share in the cause of the crime will also be regarded as a guilty of the crime. There are no two opinions among the jurists about this principle. But they differ on the question of its application. Consider the case of a person who orders a simpleton or a man with good intentions to kill somebody and the man killing him accordingly. According to the three Imams Malik, Shafi'ee and Ahmed the man ordering homicide will be treated as direct accomplice, although he does not play any direct role in the essential part of the offence. The reason given by these jurists to treat him as direct accomplice is that the person ordered to commit homicide serves as a mere tool in the hands of the former having no choice in the matter.[1] On the contrary, Imam Abu Hanifa does not regard the person ordering the commission of the crime as direct accomplice except that such an order involves disagree ability and coercion. If it does not involve coercion, the person in question is to be treated as indirect accomplice and not the main culprit. As such he will not be subject to the injunction relating to the direct accomplice.[2]

The doctrine of treating the person involved in the cause of an offence as direct accomplice is a subject of controversy among the scholars of modern law. This doctrine is incorporated in some of the laws in force today, is accepted by some of the above scholars, and rejected by others. The Egyptian law continued to adhere thereto till 1904, and accordingly the person inviting the agent to homicide and in possession of coercive means for the commission thereof was condemned to death as the actual murderer.[3] But since 1984 the Egyptian law has treated such a person as an indirect accomplice while the Egyptian courts have continued to this day to declare him the direct accomplice. In other words, these courts are convinced of the force of the doctrine under discussion and thus continue to adhere to the principle of the Islamic Shariah.

1. (a) *Al Sharh-ul-Kabeer lil* Durdeer, Vol. 4, p.216 and 218.
   (b) *Al Muhazzab*, Vol.2, p.189. (c) *Al Sharh-ul-Kabeer* Vol.9, p. 344.
   (d) *Al Mughni*, Vol.9 p.331.
2. *Bada'e-wal-Sana'e*, Vol.7, p.180.
3. See Article 223 and 224 of the Egyptian Draft Law of 1883.

(259) Punishment of Direct Accomplices

The principle laid down by the Islamic Shariah is that the plurality of the agents or doers does not affect the punishment to which each accomplice would have been liable, had he committed it single handed. Thus the punishment of the person guilty of the offence in league with other culprits is identical with that to which the culprit committing it all alone is liable although the offender with a complicity in the offence may not do all the acts he may have done when committing it single handed.

(260) Circumstances of Accomplice Bearing on Punishment

Notwithstanding the fact that punishment of every culprit is obligatory, even if he commits the offence in league with other offenders, the punishment of every offender is relative to the circumstances peculiar to him. Obligatory punishment of every offender is affected by the quality of the act, the quality of the agent and the intention thereof. The reason for this is the various possibilities involved in each case i.e. may be that the offence constitutes excess in relation to one offender, self-defence, defence (according to Shariah of assailant) or chastisement in relation to yet another. Similarly, it is possible that one agent is insane and another normal; or again one commits the offence wilfully and another commits it by mistake. All these matters have bearings on punishment. Thus in the case of self-defence and chastisement the agent is not liable to punishment provided that he does not over-step the limits of self defence and chastisement. An insane person, too, is exempt from punishment.

But a normal person of sound mind is liable to full punishment, while one unintentionally guilty of the offence is liable to a lesser punishment than the former.

(261) Is the Punishment of one Accomplice affected by the Circumstances of another Accomplice?

The principle of the Shariah in this respect is that the punishment of an accomplice is subject to the quality and intention of the agent, the punishment of the other accomplice who is devoid of these qualities will not be affected by it. For instance, a person wounds a man in self-defence and another wounds him

with the intention of killing and the victim dies of the wounds inflicted by both, in such a case the first offender will not be liable to punishment because he acts in self defence and consequently his act becomes lawful. But the second assailant will be punished inasmuch as his act is a wilful wrong and excess. The fact that in such a case of homicide he is the accomplice of one whose commission of homicide is lawful will have no bearing on his punishment; for the act of the first assailant is pardoned because of a quality which is not to be found in the act of the second assailant. Again, if an insane person commits an offence along with a person of sound mind, the punishment of the former will be remitted while the latter will get the prescribed punishment and the punishment he is liable to, will not be affected by the remission admissible for the insane person. The reason for this is that the basis of remission is a quality which is to be found in the insane accomplice which it is lacking in the normal offender. Similarly if the father kills his son in collusion with another person, he will not be liable to *qisas* but his accomplice will be. The remission provided for the father is grounded in his paternity which is peculiar to him and which is absent in the case of his accomplice. In the same way, if a murder is committed by two persons of which one is wilfully guilty, while the other is guilty by mistake, each of the two offenders will be liable to punishment in accordance with their respective intentions. One intentionally guilty will be liable to punishment for wilful murder and the other will be liable to punishment for homicial error and the lighter punishment of the latter will in no way affect the severe punishment to which his accomplice is liable, inasmuch as the basis for the commutation of punishment is the absence of intention – a quality which is lacking in the case of one intentionally guilty.

This, then, is the principle of the Islamic-Shariah on which all the jurists are agreed. And if they seem to differ at all in its

1. (a) *Mawahib-ul-Jaleel*, Vol.6, p.242.
   (b) Al *Sharh-ul-Kabeer-lil-Dardeer*, Vol.4, p.218 219.
   (c) *Bada'e-wal-Sana'e* Vol.7 p.439.
   (d) *Al Bahrul Raiq*, Vol.8, p. 301.
   (e) *Nihayatul Muhtaj*, Vol.7, p.262.
   (f) *Al Muhazzab*, Vol.2, p.297.
   (g) *Al Mughni*, Vol.9, p.373, 379 and the following.

application to crimes entailing *huds* and *qisas*, the difference does not actually arise out of the question of the application of the above principle. It springs, in reality, from the question of the applicability of another principle to the effect that" doubts invalidate *huds*. The difference on this issue too, arises in cases which involve the suspicion that the act of only one of the many offenders is punishable while the acts of others are not. Some of the examples of such cases are homicide committed respectively by accomplices intentionally and unintentionally, by one acting in self defence and by an assailant, by an insane person and by a person of sound mind, by a child and by an adult, by a surgeon performing operation and by a culprit acting wrongfully. The jurists differ in all such and similar cases because of the possibility that homicide results either from the acts of both the accomplices or the act of only one of the two. Now according to some jurists, this possibility gives rise to doubt, which in its turn annuls the *hud* to which the actual killer is liable. But other jurists are of the view that no doubt is involved here and therefore, the *hud* will not be annulled. Consequently both the offenders will be liable to the punishments which they deserve respectively. Thus the difference of opinion among the jurists of Islam does not arise out of the principle under discussion. It rather owes itself to the question of the applicability of the rule that doubts invalidate *hud*, although the outcome of the act of the person responsible for the annulment of the *hud* in effect will be that the circumstances of one accomplice would affect the other, whether such circumstances relate to the quality of the act, the quality of the agent or his intention.

This Shariat doctrine of the insusceptibility of the punishment deserved by one accomplice to the circumstances of the other accomplice is completely in consonance with the Egyptian law. In fact the same doctrine has been incorporated in all the penal laws in force today. The relevant section of the Egyptian law is couched in the following words:

"If the special circumstances of one of the accomplices in an offence necessitate a change in the nature of offence and punishment, such a change shall have no bearing on other accomplices; nor shall a change in the quality of the accomplice

effected by the knowledge of his intention or of the nature of his crime shall affect the punishment to which other accomplices are liable."[1]

B

Causal Complicity

(262) Causal Accomplices

A causal accomplice may be defined as a person who agrees with another person on the commitment of a culpable act or incites him to commit such an act or abets him in the commitment thereof, provided that agreement, incitation or abetment on his part is intentional.

(263) Conditions of Causal Complicity

From the foregoing statement it may be inferred that there are three conditions of complicity:

(a) The act involved is punishable.

(b) Agreement, incitation and abetment is instrumental in the commission of the act and

(c) The accomplice intends to cause that punishable act.

We now take them up one by one.

(a) Punishability of the Act

Complicity presupposes punishability of the act and the commitment thereof. It is not necessary that the act is committed in full. In order to call the accomplice to account, the initiation or attempt of the culpable act is sufficient. It is also not necessary that the main culprit should be awarded punishment before the accomplice; for it is possible that main culprit commits the offence with good intention. Thus the accomplice will be punished, while main offender or agent may get no punishment. Also, it may be that the agent is pardoned on the ground of his childhood or insanity, while his accomplice will in any case be punished.

(b) In the case of complicity it is essential to agree, incite and abet.

1. The Egyptian Penal Law, Article 39.

(c) As has already been seen most of the jurists differentiate between agreement and concurrence.[1] Concurrence means that the idea of committing same offence occurs to several persons, but there is no agreement between them. Thus the concurring people are not accomplices, but if they commit the unlawful act, they become direct accomplices or the real culprits. Agreement means that the main culprit or the agent and causal accomplice reach an understanding before hand; their intention should be identical and they should join each other to commit the offence. No prior agreement between the offenders, no complicity. If there is prior agreement on the commitment of a crime other than the one actually committed, such an agreement cannot be treated as valid. For instance, two accomplices agree to steal the buffalo of someone, but the main culprit goes and kills the owner of the buffalo or steals a buffalo belonging to somebody else, they have no complicity in the offence. But the punishment entailed, by substantive agreement on the commitment of the offence is not invalidated for want of complicity inasmuch as agreement on offence in itself constitutes an offence.

Again, the intended offence must result from the agreement of the accomplices in order to involve their complicity. For this reason no complicity is involved in an offence which does take place but not as the result of agreement between the offenders. For instance, two persons agree to kill a man. The difference between order and compulsion is that the former does not affect the choice of the agent and allows him the freedom to carry it out or not while compulsion does have bearing on the will of the person under duress. The choice of such a person is confined to two alternatives; either he is to commit the offence or face the consequences with which he is threatened.

If the commanding person enjoys superiority over the agent, as does the father over his young son or the teacher over his pupil, then his order assumes the character of compulsion. But if the agent is not a person of tender age or of unsound mind and

1. See Article 258.

the person commanding him to do a criminal act, his order would be mere incitation which may produce the desired result or not.[1]

There is a difference between superiority of sensible and insensible persons. The position of a sensible person who cannot oppose or resist the commanding person is that of a mere tool in the hands of the latter. In such a case the commanding person himself will be treated as the agent or the main culprit. According to Imam Malik, if the inducer is present on the spot while the offence is being committed, he will be treated as the main culprit whether or not he co-operates with the agent provided that he is in a position to commit the offence, if the offender does not.

(iii) **Cooperation**: A man who abets the offender agreed with him will also be deemed causal accomplice, although he may not have agreed with him to the commission of the offence in advance. Thus the man who keeps an eye on the way or keeps vigil to help a killer or thief in the commission of a crime is the abetter and accomplice of the offender. Again, one who entices the aggrieved party into the spot where the proposed offence is to take place or grabs anything belonging to the said party will likewise be treated as the offender's accomplice. Besides, the person who waits in readiness outside the place where larceny is committed to help remove the things stolen by thieves, will also be regarded as their abetter.

But before the time fixed for committing the offence, the man comes to know of the plot hatched against him. He goes to the person who is entrusted with the task of taking his life and attempts to kill his prospective murderer. But this fellow acts in self-defence and murders the man. In such a case the murderer who would otherwise have been the agent or the main culprit is not accountable because he kills his prospective victim in self-defence. But this person together with the one who had originally joined him in hatching the plot of murder will all the same be accountable for their agreement on homicide, although the intended homicide does not come about. The reason for this is that to

1. (a) *Al Sharh-ul 'Kabeer-lil-Durdeer*, Vol. 4, p. 216 and 218.
(b) *Al Muhazzab*. Vol. 9, p. 189.
(c) *Al Mughni*, Vol. 9, p. 331.
(d) *Badae'-wal-Sana'e*, Vol. 7, p. 180.

agree on homicide in itself comprises an offence, whether the offence is committed or not.

The View of Imam Malik

According to the view held by Imam Malik, the person who agrees with another person to the commitment of an offence and is present during the commitment thereof is also an accomplice of the main culprit, although he has no direct complicity in the offence and does not even abet the agent but would himself have committed the offence, had the agent not done it. This is the opinion of Imam Malik as to casual complicity, whether it springs from mutual agreement incitation or abetment.[1] This position is unique and is not shared by any of the other jurists.

(ii) **Incitation**: Incitation is actually designed to induce the offender to commit an offence so much so that it motivates the commission of the offence. But the situation being such that if the person induced or persuaded would have committed the offence all the same, had he not been induced or persuaded, it cannot be said of him to have been motivated to commit the offence by incitation. Nevertheless, incitation in itself is punishable by the Shariah, whether it produces the desired effect or not, because incitation to commit an offence is itself an offence and amounts to the commitment of an unlawful act.

The jurists differentiate between the main culprit (agent) and the abetter. The main culprit, according to them, is one who commits or attempts to commit an unlawful act; whereas an abetter is one who does not himself commit or attempt to commit such an act, but helps the offender by doing such acts as do not relate to the unlawful act; nor can they be treated as steps taken to commit such an act.

The jurists, however, differ on the question of a person who catches the victim killed by someone else. Some of them maintain that the person seizing the victim is the abetter of the killer but does not have a direct share in the commission of the actual offence. This is the view advocated by Imam Abu Hanifa and Imam Shafi'ee. Some of the jurists belonging to the Hamblite

1. (a) *Sharh-ul-Zurqani*, Vol.8, p.10.
   (b) *Nawahib-ul-Jaleel*, Vol.6, p.242.

School subscribe to it. They argue that the person seizing the victim does have a share in the cause of homicide but the actual act of homicide is committed by another fellow and that direct commission of act dominates participation in the cause thereof, provided that the agent does not act under duress. Other jurists, on the contrary, hold that both the persons seizing the victim and the killer are the real agents. This is the view advocated by Imam Malik and some of the Hamblite jurists. The argument advanced in support of this view is that the killer commits homicide directly while the seizor becomes the cause of the offence and that the result of contribution towards the cause of the offence and the actual commission thereof is identical. Such a result could not have ensued if either of the two acts had not been committed.[1]

The jurists, in reality do not differ on the question as to who is the real agent and who is the abetter. There is no controversy at all on the definitions of main culprit (agent) and abetter. The difference arises out of the question of the application of rules as to the method resorted to in the commission of an offence: whether the mode of commission is direct complicity or causal complicity. The rules referred to, in a nutshell, are that direct complicity when combined with causal complicity takes the following forms:

(a) Causation of offence dominates direct commission thereof. This is when the direct commission is not wrongful. For instance, when false evidence is given against the person charged with murder and sentence is passed against him accordingly.[2]

(b) Direct commission of offence dominates causal complicity. This happens when the commission of the offence nullifies the cause provided that the cause does not constitute coercion. For instance, a person hurls somebody into a river, who cannot come out of it and is subsequently killed by a third person.

(c) Cause and direct complicity are equal and both the causal act and the act of participation are of the same order; for

1. (a) *Al Sharah al Kabeer lil Dardeer*, Vol. 4, p.217.
   (b) *Al Bahrul Raiq* Vol.8, p.345
   (c) *Nihayath-ul-Muhtaj*. Vol.7, p.244.
   (d) *Al Sharhul Kabeer*, Vol.9, p.233.
2. The reader is referred to article 314 and subsequent articles of the present work.

instance, compelling the agent to commit homicide. In such a case the man who compels is the originator of the offence and induces the offender to commit it. In other words if the person resorting to coercion is not there, the offence would not have taken place at all. And if the agent, in his turn, does not commit the offence, the duress exercised by the originator would be ineffective.

The jurists, then, differ only on the application of rules. Since the seizor causes the offence and the killer commits it, the cause and the commission thereof are combined in this case. Now the jurists who maintain that the seizor is a direct accomplice, they treat the cause and commission thereof as equal and the two acts would be of the same order. But according to those who regard the seizor as the cause of offence, direct complicity or the actual commission would get the better of the cause and the act of the seizor does not constitute direct complicity in the offence, although it does abet the offender.

Imam Malik maintains that in the case of prior agreement to the commission of offence, the abetter would be treated as the direct accomplice of the agent if he is found on the spot or near it where the offence is committed in such a position that if the main culprit seeks his help in doing the criminal act he does not lag behind him even in committing the crime. But if the abetter is found in such a position that he is unable to be helpful in the commission of the offence, then he would be treated as a causal accomplice. All the other jurists are agreed that the abetter is the causal or in-direct accomplice unless he is directly guilty of the offence.

Third Condition

The third condition of causal complicity is that the accomplice proposes to bring about an offence by the use of his own resources or wants to cause a specific offence by agreement, incitation or abetment. Even if he has no intention of committing any particular offence, he will be considered an accomplice in whatever crime is committed provided that it falls within the scope of his possible intention. If he has no intention of committing any crime at all or intends to commit a determined crime but the agent commits

some other offence, then he will have no complicity in such offence. For instance, a person lends his axe to somebody to dig the ground, but the latter kills a third person with the axe. In such a case the owner of the axe cannot be said to have helped in the homicide. Let us consider another case. Suppose a person incites another person to kill a third person, but the person so incited destroys his crop instead of killing him. In such a case the first person will have no complicity in the offence, but this does not mean that he is not to be treated as guilty of incitation also, although the crime to which he incites the agent is not committed. Incitation in itself is an offence.

(264) Causal Relationship between Complicity and Crime

Complicity presupposes its causal relationship with the commission of crime. If prior agreement is instrumental in complicity, the proposed crime would necessarily come about as the result of agreement, but if it does not result from prior agreement, then no complicity exists. Similarly, the intended crime is necessarily the result of incitation; but if incitation does not bring forth the crime or the main culprit is not susceptible to incitation, there can be no complicity. Similar causal relationship must also subsist between cooperation and occurrence of crime. Suppose someone entices a person into the place where he is to be killed by a third person but the killer is not present there. So the first person leaves him at the place so that he may return home. Subsequently the main culprit turns up at the appointed place where he comes to know about the whole situation. He then makes for the victims house and murders him there. In such a case the person abetting the killer is not accountable as an accomplice, for there is no causal relationship between his act of abetment and occurrence of the crime. But mere absence of complicity does not inhibit punishment for agreement, incitation and abetment. All these acts constitute offences in themselves and the award of punishment for them does not depend on the commission of the intended crime.

(265) Is Complicity Possible by a Negative Act?

Agreement, incitation and abetment are negative acts. Of

these, the two first mentioned are by nature positive means. You cannot conceive that agreement is possible without agreement or incitation is possible without incitation But as regards abetment, negativity is possible; for instance, a man sees some people commit larceny in a house and keeps quiet; or he sees a man killing a third person but does not stop him; or, again witnesses a man throwing into the river a child who cannot swim, but does not ask him to desist from such a brutal act; nor does anything to save the child either. Can in all these and similar cases silence on the part of the spectator be treated as criminal abetment or not? Majority of the jurists believe that in such cases the silent spectator is not the abetter of the offender, inasmuch as his silence can not he treated as complicity in the offence; nor can it be considered abetment from the legal point of view, although ethically it may be regarded as complicity. The reason for this is punishable abetment presupposes agreement between the main culprit and the accomplice as well as the accomplice's intention that the offence should take place and that whatever he does by way of abetment leads to the commission of the offence. Being a silent spectator of the commitment of offence by the culprit is not the result of any prior agreement or understanding. The reason for the spectator's silence may either be the fear of the criminal or his indifference. Moreover, the silence of the spectator is not designed to let the offence occur; nor is there any causal relationship between his silence and the commission of the offence which must exist between the abetter's act and the occurrence of crime. Some jurists, however, do not subscribe to this view. They draw a line of distinction between the person who is able to prevent an offence and one who is unable to do so. If a person is in a position to stop the offenders from the commission of crime and save the aggrieved party from the harm resulting therefrom, then he will be accountable under the criminal law for his reticence. But one who is unable to prevent the offence and save the life of the victim cannot be called to account for his silence; nor will he be treated as an abetter because he is powerless and Allah does not hold anybody responsible who does not have the power to act.[1]

1. *Al Mughni*, Vol.9, p.580-1.

(266) Relinquishment of Complicity and its Effects

If the accomplice relinquishes his agreement with the main culprit or ceases to incite or abet him, and yet the offence is committed all the same, then the accomplice may be pardoned in the case of agreement and abetment, inasmuch as the extent to which he agrees or abets or incites does not cause the commission of the offence. However, the view that the accomplice, who incites, is forgivable is untenable, unless such an accomplice proves that by the time the offence was committed, his incitation had become inefficient and that the main culprit did not commit it under influence of his incitation. Nevertheless, the punishment for agreement and incitation will not be invalid because these acts are crimes in themselves in isolation from the intended offence. Similarly, if cooperation constitutes a crime, the punishment, too, will not be void.

(267) Punishment of Causal Accomplice

One of the fundamental principles of the Shariah is that the prescribed punishments are not meant for the causal accomplice. It enjoins that anyone who shares the commission of an offence by any means of complicity shall not be liable to *hud* or *qisas*, whether he participates in it by agreement, incitation or abetment. Such an accomplice will, however, be liable to penal punishment. The reason for the exclusive applicability of this principle to the *hud* and the *qisas* offences is that such offences entail extremely severe punishments. As distinct from these offences, the offence of a causal accomplice involves doubt which invalidates his direct complicity in the commission of the offence. Moreover, the offence of causal accomplice is in any case, much lighter and less dangerous than that of the main culprit. Therefore the punishment to which the two are liable respectively cannot be equal.

But if the nature of the offence of which the causal accomplice is guilty is such that the agent serves as a mere tool in the hands of the said accomplice he will be liable to *hud* or *qisas* because he will then be treated as the main culprit and not as the causal element.

The view of Imam Malik to this effect has already been discussed. According to this view if the main culprit is present

these, the two first mentioned are by nature positive means. You cannot conceive that agreement is possible without agreement or incitation is possible without incitation But as regards abetment, negativity is possible; for instance, a man sees some people commit larceny in a house and keeps quiet; or he sees a man killing a third person but does not stop him; or, again witnesses a man throwing into the river a child who cannot swim, but does not ask him to desist from such a brutal act; nor does anything to save the child either. Can in all these and similar cases silence on the part of the spectator be treated as criminal abetment or not? Majority of the jurists believe that in such cases the silent spectator is not the abetter of the offender, inasmuch as his silence can not he treated as complicity in the offence; nor can it be considered abetment from the legal point of view, although ethically it may be regarded as complicity. The reason for this is punishable abetment presupposes agreement between the main culprit and the accomplice as well as the accomplice's intention that the offence should take place and that whatever he does by way of abetment leads to the commission of the offence. Being a silent spectator of the commitment of offence by the culprit is not the result of any prior agreement or understanding. The reason for the spectator's silence may either be the fear of the criminal or his indifference. Moreover, the silence of the spectator is not designed to let the offence occur; nor is there any causal relationship between his silence and the commission of the offence which must exist between the abetter's act and the occurrence of crime. Some jurists, however, do not subscribe to this view. They draw a line of distinction between the person who is able to prevent an offence and one who is unable to do so. If a person is in a position to stop the offenders from the commission of crime and save the aggrieved party from the harm resulting therefrom, then he will be accountable under the criminal law for his reticence. But one who is unable to prevent the offence and save the life of the victim cannot be called to account for his silence; nor will he be treated as an abetter because he is powerless and Allah does not hold anybody responsible who does not have the power to act.[1]

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But if the nature of the offence of which the causal accomplice is guilty is such that the agent serves as a mere tool in the hands of the said accomplice he will be liable to *hud* or *qisas* because he will then be treated as the main culprit and not as the causal element.

The view of Imam Malik to this effect has already been discussed. According to this view if the main culprit is present

on the spot in such a way that if the agent fails in the commission of the offence, he will commit it himself, whatever the means by which he does it, he shall be treated as the main culprit and shall as such be liable to *hud* and *qisas*.

Penal punishments may be viewed from two angles:

(a) If we consider the penal offences on the analogy of the *hud* and *qisas* offences, it necessarily follows that the punishments of the main culprits and the causal accomplice cannot be equal and that the punishment of the indirect accomplice should be lighter than the direct accomplice inasmuch as the principles applying to the *huds* and the *qisas* offences are the same as apply to most penal offences. Moreover, the offence of the causal accomplice is lighter and less serious and, therefore, the two offenders are not amenable to equal treatment.

(b) If we say that the above principle is exclusively applicable to the offences entailing *huds* and *qisas* and that the ground of difference between the direct and indirect accomplices is the severity of punishment, then there should be no discrimination between the two offenders in case of penal offences. This, according to us, is the true position. The crimes committed by both the accomplices as well as the punishments provided for them are of penal nature. It allows the judge the discretionary powers to award the offender whatever punishment he deems fit, taking into consideration the circumstances of the case. Moreover as penal punishments have not been prescribed in concrete terms and their determination has been left to the individual judgement of the court, prescription of the limits of punishments for such crimes would be extremely difficult. Moreover, no practical benefit is expected to accrue from the prescription thereof.

This view warrants a very wide scope of punishment to which a causal accomplice may be liable. It may be more severe or lighter than or equal to the punishment that the agent may deserve. The reason from this is that penal punishments often involve two limits - the maximum and the minimum — and the court is empowered to choose any punishment between the two limits as it deems fit in accordance with the circumstances of the case. If the court feels that the circumstance of the main agent

call for leniency, it may pass a lighter sentence; and if it feels that the circumstance of the causal accomplice necessitate severe punishment, it will pass a sentence accordingly. The court, moreover, is competent to take the punishment to the highest limit or bring it down to the lowest; or in case if it comes to the conclusion that the circumstances of both the accomplices call for identical punishment, it will pass equal sentences against them.

(268) Liability of Causal Accomplice for Probable Intention

The offender guilty of complicity in the cause of the offence committed by the main culprit will be accountable for the offence even if the offence committed by the main culprit is more serious than the one originally intended by the accomplice provided that the offence of which the main culprit is guilty is also the probable result of the complicity and also that it may possibly constitute the consequence of the intended offence. For instance, a person incites another person to subject a third person to violence and the person so incited strikes the victim with the result that he dies of the blow inflicted by the agent. In this case, the causal accomplice is accountable not only for the blow but also for quasi-wilful murder. The reason for this is that the commission of the offence of striking involves the probability of murder. Again, if the agent inflicts such a blow that the victim's hand is dismembered or incapacitated, the causal accomplice will also be accountable for the dismemberment or the incapacitation of the victim's hand, because it would be the expected result of the blow.

(269) Circumstances of Direct Accomplice bearing on Causal Accomplice

The circumstances bearing on the punishment of the direct accomplice sometimes, but not often, affect the punishment of the causal accomplice. The punishment of the former, as has already been stated, is dependent on the quality of the act, the quality of the agent and his intention.

Looked at from the viewpoint of the quality of the act, if such an act constitutes a penal offence committed by the main

culprit and is intended by the causal accomplice, then both of them shall be liable to punishment for the offence in question. However, if the offence entails a *hud* or *qisas*, each accomplice, as has been pointed out, will be awarded specific punishment.[1] But if the main culprit commits an act which is not intended by the causal accomplice, the latter will not be liable to punishment provided that the act is not the probable outcome of his intention.

If punishment is dependent on a quality of the agent which entails severity, reduction or annulment of the accomplice will not be affected by it at all. The reason for this is that the ground of severity, reduction or annulment of punishment is a quality which is to be found in the main culprit but not in the causal accomplice. Thus if the main offender or direct accomplice is a child or a lunatic, he will not be liable to any punishment, whereas causal accomplice will be liable. Again, if the direct accomplice is a habitual, he will be awarded severe punishment but the punishment to which his accomplice is liable will remain unaffected by the severity of his punishment. Similarly, if the direct accomplice is a minor, he will be awarded lighter punishment without affecting the punishment of the causal accomplice.

However, if the punishment is to be awarded on the basis of the agent's intention shared by the accomplice, the latter will be liable to the same punishment as the agent. But if the accomplice's intention calls for a lesser punishment, he will not accordingly be awarded the same punishment.

But it should in all cases be kept in view that where *hud* and *qisas* offences are involved, the punishment to which the two accomplices will be liable are different.

(270) Circumstances Peculiar to the Accomplice

If the causal accomplice has certain specific qualities which necessitate a change in the nature of offence and punishment, then such a change will be applicable to him alone. For instance, if he is a habitual offender, he will get severe punishment; if he is a minor, his punishment will necessarily be lighter and if insane, his punishment will be totally remitted. However, if the causal accomplice is legally authorized to do an act but he incites

1. See Article 267.

someone else to do it, such an act would constitute an offence with reference to the agent but is no offence so far as the causal accomplice is concerned. For instance, he persuades a person to admonish his son, pupil or wife; the person doing such an act will be guilty of an offence, but not the causal accomplice, because if the latter had done it; the act in question would not have constituted an offence. If the agent's act exceeds the limits of admonition, the causal accomplice would be accountable for the excess committed by the agent.

(271) Shariah vis-a-vis Modern Law

The man-made laws in force are in complete harmony with the Shariah in respect of the definition of causal complicity, the conditions of complicity and relationship of causality subsisting between the means of complicity and causal complicity.

Thus the Belgian laws is in consonance with the Shariah with regard to punishment for the *hud* and *qisas* offences. It lays down lesser punishment for the causal accomplice than for the main culprit. Similarly the Egyptian law conforms to the Shariah in respect of wilful murder.

As regards punishment of accomplices for complicity in penal offences, the position of the Shariah is identical with the standpoint of the Egyptian and French laws in most cases. Both these laws provided equal punishments for the causal accomplice and the direct accomplice.

The Italian law likewise has adopted the *Shariat* principle that the causal accomplice may benefit from his peculiar circumstances.

(272) Punishment for Resorting to means of Complicity when Objective of Offence is not Achieved

The principle of the Shariah in this regard is that the mental processes of ideation and volition are not punishable unless they are given expression to or acted upon. This principle is based upon the following Tradition of the Holy Prophet:

> "Allah has forgiven my *Ummah* for any temptations or for any wrongs coming into their minds except when they are uttered or translated into action."

It may be inferred from the above principle that if a person thinks of committing an offence, decides and resolves to commit it, he will not be liable to punishment until his intention is carried out regardless of the fact whether it is translated into action directly by the commission of the intended offence or is fulfilled verbally by asking or inciting someone else to commit it or by agreeing with him for its commission.

According to the principle of the Shariah agreement on this commission of an offence, incitation and abetment are self-subsistent crimes, whether the objective of the intended offence is achieved or not. There are two reasons for their being self-subsistent: First, it is obvious that crimes are serious and major evils. Second, agreement on an offence, incitation and abetment to commit it lead to the incidence of crimes. Now, anything which leads to something unlawful in itself as a general rule is unlawful.

The person who agrees on doing a criminal act and is guilty of incitation and abetment in the commission thereof is liable to punishment even if such an act is not actually committed inasmuch as agreement, incitation and abetment are themselves substantive crimes. If the intended criminal act actually takes place, then the person agreeing on its commission of an offence, incitation and abetment are self-subsistent crimes, whether the objective of the intended offence is achieved or not. There are two reasons for their being self-subsistent: First, it is obvious that crimes are serious and major evils. Second, agreement on an offence incitation and abetment to commit it lead to the incidence of crimes. Now, anything which leads to or something unlawful in itself as a general rule unlawful.

The person who agrees on doing a criminal act and is guilty of incitation and abetment in the commission thereof is liable to punishment even if such an act is not actually committed inasmuch as agreement incitation and abetment are themselves substantive crimes. If the intended criminal act actually takes place, then the person agreeing on its commission, inciting and abeting the agent would also become causal accomplice and would be awarded punishment in accordance with the principle explained above. In short, incitement for the commitment of crime as well as criminal

agreement thereon is punishable under the Shariah even such incitement and agreement do not produce the desired result. The *Shariat* principle enjoining punishment for criminal agreement, incitement and abetment is in complete harmony with the principle of Shariah that mere intention or will entails no punishment. It is punishable only when verbally expressed or translated into action. The person guilty of criminal agreement or incitation first intends to get the crime committed and then puts his intention into practice or assists in its actual commission by abetment. Thus his intention or temptation becomes punishable when expressed in words and action.

The man-made laws in force are in consonance with only one of the two principles of the Shariah. These laws do acknowledge that any criminal will or intention divorced from word and deed is not punishable. But this principle is not applied absolutely. It is enforced with certain reservations. For instance, a wilful premeditated offence entails severe punishment while punishment for an unpremeditated but intentional offence is lighter. This difference between punishments means that the man-made law provides for the punishment of intention in isolation from action, whereas the Shariah seeks to enforce the above mentioned first principle meticulously admitting of no exception whatsoever. As regards the second principle, the man-made laws in force are opposed to the Islamic Shariah, since they contain no provision for the punishment of criminal agreement incitation and abatement unless the intended offence is committed, regardless of the fact whether it is just attempted or committed in full. But the man-made laws are now abandoning the customary course, as they have begun to treat criminal agreement as substantive crime and provide punishment for it regardless of the fact whether the intended offence has taken place or not. The section included in article 47 of the Egyptian criminal law provides an example of this new trend, which actually amounts to the acceptance of the injunction of Islamic Shariah. It is obvious that the Shariah in this respect is much more rational and quite adequate to fulfil the needs of man. Looked at rationally, criminal agreement incitation and abetment are either lawful or unlawful. If they are intrinsically unlawful punishment will be obligatory, whether or not the intended

offence is committed, if intrinsically lawful the question of punishment does not arise at all and if the person guilty of the offence is sensible and has the freedom of action, nobody else should be accountable for his conduct.

The *Shariat* principle does not only safeguard the public peace and collective interest but also prevents the crime from assuming serious proportion. That is the reason why the man-made criminal laws are constrained to include the principle of the Shariah.

Chapter VI

Moral Aspects of Crime

(273) Scope of Chapter

In this chapter two topics will come under discussion.

(1) Criminal Accountability

(2) Development of Criminal Accountability

A separate section has been devoted to each of these topics.

Section I

Criminal Accountability

(274) Subject Matter

In this section we will deal with the following questions:

The Basis of Criminal Accountability: The subject of criminal Accountability. The Cause and Degrees of Accountability, Criminal Intention, Effects of ignorance, Mistake and Lapse on Accountability. Effect of consent on Accountability. Acts linked with Accountability and their Relationship with Accountability.

A. Basis of Criminal Accountability

(275) Historical Background of Criminal Accountability

(1) **Man-made Laws.** According to the man-made laws, man as well as animals and inanimate objects were treated as accountable during the middle ages and as late as the French Revolution. Inanimate things were punished for the harmful acts imputed to them just as man was punished for the commission of forbidden acts. Nor is this all. Punishments were awarded even to the dead, inasmuch as death was not reckoned as one of the causes warranting exemption from apprehension and punishment. An individual was held responsible not only for his own acts but

also for the conduct of another individual even if he knew nothing about what the latter might have done and had no control over him. Again, the punishment of the offender extended to the members of his family and his friends. They too were subjected to the same punitive treatment which the real offender was liable to notwithstanding their innocence.

Every individual was held criminally responsible irrespective of the fact whether he was an adult or a child; a mature sensible person or one mentally deficient; whether free to act of his own accord or was in his senses or out of mind.

Besides, forbidden acts were not determined in advance. People did not even know that an act was unlawful before they were called to account for it. Most of the punishments, too, were not determined and it was left to the discretion of the court to award as much punishment as it chose. Thus if anyone did an act which had not been prohibited but the man in authority deemed it punishable, the agent was awarded punishment accordingly. It was not considered at all whether punishment had been awarded for the act in question previously or whether it had been declared unlawful. Different punishments were awarded openly for one and the same offence, as the court was vested with absolute powers to determine punishments both quantitatively and qualitatively. It could award without reservations any punishments to anyone it deemed fit.

In short the man-made laws were based on such outmoded principles. These principles were rooted in the doctrine of material accountability which governed all the legislated laws. It took into account only the material relationship subsisting between the offence and the offender and the people associated with him. The doctrine in question took no notice at all of the offenders psychology, his capacity to deliberate, his distinguishing characteristics, freedom of choice, his intention and the relationship of all such things with the unlawful act and their bearings thereon.

The above principles governed the legislated laws till the French Revolution. With the advent of the French Revolution those wrongful principles were replaced with just and fair provisions and consciousness and choice were made the basis of accountability. Subsequently, only a living man came to be treated as accountable

and punishment characterised as purely personal and non-transferable. Children of weak understanding were exempted from accountability. Only morally conscious children came to be treated as liable to ordinary punishment. Accountability of a person committing an offence under duress as well as of an idiot was nullified. It was acknowledged as a fundamental legal principle that no act is criminal and punishable unless a law is promulgated to that effect and punishment can be awarded only for such acts which are committed after the promulgation of the law characterizing them as crimes. Moreover, the powers of the court as to punishment and the estimation of punishment were qualified and restricted.

(2) The Islamic Shariah

Anyone with a little knowledge of the Islamic Shariah will not have the slightest hesitation to declare that all these so-called modern legal principles which were introduced into the legislated laws as late as the nineteenth and twentieth centuries were contained in the Islamic Shariah right from the very beginning and constitute some of its fundamental tenets.

The Shariah holds responsible only those living people who are under obligation. Death annuls all responsibilities and accountabilities.

The Shariah condones the misdeeds of children till they reach the age of puberty. Says Allah:

> "And when the children among you come to puberty, let them ask leave (to enter the house) as those before them used to ask it." (24:59)

And Holy Prophet lays down that three persons are not accountable:

> "Three persons are not accountable: a child until he or she reaches the age of puberty, a person in sleep until he is awake and an insane person until he becomes normal."

The Shariah does not call to account anyone who commits an offence under duress as well as anyone who is incapable of deliberate choice. Such persons have been exempted from accountability in the following divine injunction.

"Save him who is forced thereto and whose heart is still content with faith." (16:106)

Again,

But he who is driven by necessity, neither craving nor transgressing, it is no sin for him." (2:173)

And the Holy Prophet has said:

"Lapse and error on the part of my Ummah are forgiven and also such acts as it is forced to do."

The basic tenet of the Shariah in this context is laid down in the following verse of the Holy Quran:

"That no laden one shall bear anothers load. And that man has only that for which he maketh effort." (53:38-39)

Hence every man is accountable for his own crime, and nobody else is responsible for it, whatever his relation with the offender.

Another basic tenet of the Islamic Shariah is that until the prohibition of an act is declared, it is lawful to do it and when its prohibition is declared, it is punishable as soon as the relevant law comes to the knowledge of the people. Any act done before the people come to know of it its prohibition is subject to the injunction that what is done in the past is forgiven by Allah.

The Shariah does not vest the courts with the power of choosing punishments and determining the quantity thereof in the case of *hud* and *qisas* offences. They have, however, been even limited freedom in awarding penal punishments. For instance, they have been empowered to choose anyone of the many prescribed punishments for a penal offence and if any of those punishments entail two limits they prefer either of the two as they may deem fit in consideration of the offender's circumstances. But the courts are not competent to award any punishment other than laid down by the ruler; nor can they diminish or enhance the quantity of any punishment prescribed by the ruler.

These principles which were introduced into the modern laws only during the last century had been enforced by the Islamic Shariah twelve hundred years ago. It is most deplorable indeed that a great majority of the Scholars of law in the Islamic countries

are ignorant of this historical fact and have presumed that they owe their origin to the modern laws.

(276) The Shariat Doctrine of Criminal Accountability and the Basis Thereof

Prohibited acts are such deeds as are ordered to be abstained from and prevented from being committed. The reason for their prevention and prohibition is that their commission or omission is detrimental to collective order and system of beliefs as well as to the life, property, honour and sentiments of the individuals or is prejudicial to collective and individual interests. Acts that appear to prejudice the interests of the individuals adversely affect collective interests in the ultimate analysis. It may, therefore, be concluded that acts declared unlawful are in reality prohibited to safeguard the public interest and peace and tranquillity. The punishments laid down for such acts too are intended for the same purpose.[1]

Prohibition of acts is not something futile, because the agent under certain circumstances derives benefits from them. For instance, larceny, breach of trust and bribery yields material benefits to the offender; Coition gives carnal pleasure to the adulterer or the adulteress, gratifying his or her sexual appetite, and vindictive homicide assuages the emotion of revenge and purges the killer of the sense of indignity and disgrace. In short, the offender does get some benefit or other from the commission of an offence. But the benefits accruing to him result in the disruption of collective order and harm to peace and tranquillity. In order to forestall these harmful results and save the society from disorder and disruption the offences in question have been declared unlawful.

Some offences are treated crimes by nature because they militate against moral virtues; for example, larceny and adultery. There are others which do not constitute crimes in themselves. The law giver too has also not declared them unlawful on grounds of their repugnance to morality. They are tabooed because they are harmful to the society; for instance ban on carrying arms in one's movement from a place affected by pestilence to some

1. See Article 43.

other place or on the acquisition of knowledge. Prohibition of such acts is actually aimed at the safeguard of common weal.

Since prohibition of acts is governed by considerations of common good, punishment is laid down for them. Punishment is the best way to safeguard society against crime and is as such a social necessity, from which there can be no escape. Any other means that can serve as an alternative to punishment in the protection of society against crimes and criminals is an inevitable social necessity like punishment.

Inasmuch as punishment is a collective need it should remain within the limits of need. It will be wrong to let punishment exceed the quantum needed for collective security and prevention of harm to social life resulting from the incidence of crime, just as it will be wrong to let punishment fall short of the quantum needed to safeguard society against crimes.

If punishment is neither excessive nor deficient and fulfils the following conditions, it may be regarded as adequate for the satisfaction of the considerations of common good.

(1) Punishment should be such as may serve to admonish and chastize the offender and prevent him from committing it again. It should be flexible enough to enable the court to choose the kind of punishment suited to the circumstances of the case and to determine such quantity thereof as would suffice to admonish the offender as well as forestall any wrongful treatment to him. This requires diversity of punishment, i.e. different punishments for the same offence and punishments with maximum and minimum limits enabling the court to choose the kind of punishment to be awarded and to determine its quantum between the two extremes.[1]

(2) Punishment should also serve as a deterrent to one who is not an offender so much so that if he thinks over the offence and the punishment thereof, he realizes that the potential damage resulting from the punishment is far greater than the benefits that are likely to accrue from the offence. This criterion calls for providing for such punishments with upper limits which makes crime abominable.

1. The Shariah adheres to this principle in the case of all offences other than the *hud* and *qisas* crimes. The reason for this has been explained in articles 440-442.

(3) Punishment should also be proportional to offence. It must be commensurate with the magnitude of the offence. The punishment of piracy, for instance, should not be identical with that of larceny or the punishment for wilful murder should not be the same as that of murder by mistake. The Shariah has laid down amputation of the thief's hand as punishment for larceny; but amputation of the tongue has not been enjoined for slander; nor has castration been prescribed for adultery. Again, the Shariah prescribes retaliation for wilful murder and not for the loss of property.

(4) Punishment should also be general so that the punishment prescribed for an offence may be applied to every offender committing it and no person might be able to escape it because of his rank or status.

Any punishment that fulfils the four conditions mentioned above is normal. But it will be awarded only to an offender of sound mind having freedom of choice. If the offenders are persons of unsound mind or have no freedom of choice, then, as a general rule, they will not be liable to punishment. For instance, an insane person who commits homicide will not be liable to *qisas*. If an unmarried insane person is guilty of fornication, he will not be flogged. Similarly, punishments are not applicable to children with immature minds. But exemption from punishment on grounds of insanity and lack of choice or mental immaturity does not inhibit appropriate measures for the safeguard of the community. Thus the immature child who commits homicide may be sent to an asylum or reformatory. An insane person who cannot be subjected to punishment may likewise be sent to a mental hospital in the interest of public security. Similarly, in case if it is not possible to award a general punishment to an offender, while it is imperative to take precaution against his wickedness and keep the society immune from the evil he is likely to cause, the community may take preventive measures in spite of the offender's unaccountability and in applicability of punishment to him. For instance, he may be kept in a hospital, camp or reformatory for an indefinite period and may be set free when he is reformed and purged of his wickedness. The Shariah treats all these reformatory measures as penal punishments. But they are specific punishments rather than

general ones. They are actually aimed at the protection of the community on the one hand and at the reformation and admonition of the offender on the other. An example of this is the reformation of juvenile delinquents.

The jurists attribute the condition of choice and understanding as a condition of punitive liability to the fact that Allah Almighty has created his servants, life and death and has embellished the earth with various things in order to test the conduct of his servants. He has created the causes of this test both within and without the human souls; i.e. both subjectively and objectively. The subjective causes include reason, auditory and visual faculties, intention, wishes, potentialities temperaments, love and hatred, propensities and absence of propensities and all those conflicting moral tendencies which of necessity emerge in conduct just as effects necessarily follow causes. Beyond the human souls He has created benefits and objects for which human beings crave and compete with each other. He has also created certain objects which the humans abhor and strive to get rid of them. But Allah has not left the crude tendencies of human nature as they were. He has endowed it with reason so that it might distinguish between good and evil, between the beneficial and the harmful. He has, moreover, imbued human nature with the feelings of pain and pleasure together with a knowledge of the causes thereof. Nor is this all. He sent among men His messengers to explain to them the details of good and evil, providing at the same time so many proofs of their sincerity and veracity that there was no excuse to defy them. The wisdom of sending messengers and the exhaustive demonstration of their candour and truthfulness was that whoever was doomed to damnation may be damned after the advent of the divine message and whoever was to enjoy the eternal bliss of life in the Hereafter should seek guidance from that unambiguous message. Again, He has illustrated the truth further and removed all the ambiguities by means of assurances, pledges persuasion and warning. He has adopted every mode and method to make it possible for man to obey His Commands and abstain from aught prohibited by Him. He has disciplined the people to control their dispositions and imbued them with the urge to think and deliberate and to rely on reason

in preference to everything else. He has completed their faith as a way of life, and has thus bestowed upon them his final gift. Also Allah Almighty has elucidated through His Apostles, the causes of punishment, reward, persuasion and warning. Some of these have been demonstrated in this mundane existence in order to serve as the signs of Allah in the world, testifying to the kind of punishment and reward for the Hereafter and make the events of worldly life serve as the reminder of things to be experienced in the heafter. A significant aspect of the divine wisdom is that only those acts are forbidden for man which are harmful to his mind, body and property as well as detrimental to the individuals living in the society and to their social system. Moreover, Allah has laid down such punishments as are designed to put an end to greed, disobedience and tyranny. People will derive nothing but benefits from obeying the commands of Allah; but if they disobey, they will have to bear the consequences thereof. As men are aware of forbidden things and also of the consequences of disobeying the divine commands, they shall certainly deserve punishment if they violate those commands deliberately in exercise of the freedom of choice.[1]

A person devoid of understanding and deprived of choice is not liable to any punishment. The reason for this is that the responsibility for doing or not doing an act is dependent on his understanding of the command or prohibition as the case may be and only the person who is in possession of reason understands commands and prohibitions. Similarly it cannot be said of a responsible person to have disobeyed the command of the lawgiver who is forced to commit a forbidden act.[2]

The reason why punishment is not obligatory in both the cases mentioned above as given by the jurists is well illustrated by the position taken by one of them. Abul Hasan A'amadi has offered the following explanation in his book 'Al Ahkam fil Usoolul Ahkam.'[3]

"The intellectuals are unanimous on this that the condition

1. *Aa'lamul mooqi'een,* Vol.2, p.214 and 216.
2. (a) *Al Mustasfa lil Ghazzali,* Vol. 1, p. 83, 84 and 90.
3. *Al Ahkam-fil-Usoolul Ahkam, Lil A'amadi,* Vol. 1, Page 215 and what follows.

of being under the obligation[1] (responsibility) is that he is of sound mind and understands the responsibility entrusted to him. Obligation bears affinity to addressing someone; for it is meaningless to address a man devoid of reason just as it is meaningless to address animals and plants."

A person who can simply understand that he is being addressed to but like a child or insane person cannot understand whether he is being enjoined to do or not to do something and what he is enjoined is the Command of Allah which ought to be obeyed and that the person so commanded should have certain qualities is subject to the injunctions meant for plants and animals and cannot be treated as responsible unless, of course, if someone is looked upon as under obligation who is incapable of fulfilling it. The meaning of obligation hinges upon understanding the address itself as well as upon grasping the details of the address.

"An intelligent child is capable of understanding things better than an average child with immature mind, but he too is incapable of grasping the existence of Allah as a grown-up person with a mature mind. The significance of responsibility or obligation is dependent on one's capability of being addressed to of being under the obligation to say prayers and of understanding the fact that candid and genuine prophets have existed and have been the true messengers of Allah. Now as an intelligent child is incapable of grasping all these details, he is no better than an average immature child because he does not fulfil the condition of obligation.

Let us consider the case of a child who is on the verge of puberty. He is to be bound by obligation after the passage of a little time but as understanding and reason are latent subjective forces which manifest themselves gradually and slowly and as there are no hard and fast rules to claim that they are fully mature, the lawgiver has taken to specify puberty as the criterion of responsibility and has excluded the age preceding puberty from the bonds of obligation. The edict of the Holy Prophet to this effect is as follows:

1. *Person under obligation in the terminology of the Shariah means mature and sensible person to whom the injunctions and the prohibitions of the Shariah are addressed*

"Three individuals are not under obligation: a child before puberty, a person in sleep before he is awake and an insane person before his sanity is restored."

"An individual who does not know at all that he is responsible for the things referred to and who is not in his senses, is neither capable of being addressed to nor of being under any obligation, inasmuch as he is in a mental state inferior to that of an immature child. In such a state of mind he is incapable of grasping the command of the lawgiver and its purpose, realizing the responsibilities entailed by the command and bearing the burden of guarantees involved by such responsibilities.

The jurists differ on the question whether a person forced to do an act and deprived of the freedom of choice to abstain from it is responsible or not. The tenable view in this context, however, is that if coercion is carried to the point of violence and the victim is completely in the power of another person with no choice but to commit the act, then the agent is not accountable for the commission of or abstinence from the act, unless he is to be treated as responsible for an act which is beyond his power. But the Prophet has enjoined otherwise:

"My Ummah is forgiven lapses and errors and all such acts as it is forced to do."

This tradition annuls accountability for the acts in question.

But if duress is not carried to the point of violence, then the person under duress has the freedom of choice and is responsible for his act rationally as well as under the Shariah.

This, then, is the doctrine laid down by the Shariah in relation to accountability. It rests on two bases:

(1) Punishment has been made obligatory in order to safeguard the society and public order and ensure its security and peace. In other words, punishment is essential for the survival of society. Now every necessity should have a scale of punishment. Thus punishment should be severe or light if public interest so requires. But if it is in the interest of the public to eliminate the offender he will either be sentenced to death or life imprisonment or he will be kept in prison until he is reclaimed.

(2) Person liable to general punishment is one who is

under obligation and capable of rational choice. If the person under obligation does not have the freedom of choice, he will not be accountable for his acts and will not, consequently, be liable to punishment. But there is nothing in Shariah inhibiting the community to safeguard itself against the malignancy of one, who is not accountable for his acts and adopt for the purpose such measures as may be deemed fit for the dangerous person not amenable to accountability and suited to the society as a whole, even if the measures so adopted may be in the form of an appropriate punishment.

(277) The Principle of Criminal Accountability as Contained in Man-made Law

The above doctrine of accountability was presented by the Islamic Shariah thirteen hundred years ago; whereas under the man-made laws more than one doctrine have been in force. Before the French Revolution criminal accountability rested on purely material basis. It called for the punishment of anyone guilty of a criminal act whoever, he was and whatever his circumstances were. Under this doctrine, plants and animals, dead and immature people as well as persons of unsound mind were treated as liable to punishment, besides living sane and mature human beings.

After the French Revolution, however, criminal accountability came to be grounded in the philosophy of free will and was termed as the immitative cult. This doctrine in a nutshell is that under the criminal law only the person having freedom of choice may be treated accountable. Only man is endowed with this freedom and he too, can distinguish between good and evil after reaching a certain age and deliberately choose between the two. To such a person alone can the commands of the legislator be addressed. If a person capable of deliberation and free choice violates the injunctions of the legislator, then justice demands that he should be punished for his offence. In other words, accountability owes itself to perception and free will and punishment is the guarantee of the enforcement of the legislator's injunction as well as the retribution of its infringement.

The imitative doctrine was in force for a long time to be subsequently replaced by the legislative doctrine. This doctrine

is based on deterministic philosophy. This doctrine, in essence, is that an offender does not commit a crime intentionally. There are various factors beyond his control which include heredity, environment, education and physique. It is under the pressure exerted by the interplay of all these factors that he is driven to commit the offence. When the free-will of the offender does not play any part in the commission of an offence, he cannot be punished according to the doctrine of imitation. He will rather be liable to punishment if punishment is regarded as a means of safeguarding the society and the security of the community. On this ground every human being is amenable to punishment whether or not he is capable of free choice and perception and is sane or insane. However, in awarding punishment his age and rational capacities will be taken into consideration. This doctrine has been incorporated in some of the legislated laws including the Russian law which was promulgated in 1926. But most of the legislated or manmade laws in force have not adopted it. Yet another concept was expounded subsequently, which was designed to harmonize the two doctrines we have already discussed. 'This new concept is termed as the doctrine of relative freedom of will. Thc advocates of this doctrine maintain that it is the theory of immitation which must be followed because man's free will does play a significant role in the commission of crime, however limited it may be. But the new doctrine admits of the right of the legislator to ensure the security of the community against the crimes of those individuals who are not liable to punishment for want of the freedom of choice and perception. The legislator can do this by promulgating specific measures suited to the circumstances of such individuals. This is the doctrine incorporated in the laws in force today.[1]

It may be mentioned here that this new doctrine produces the same results as the Shariat doctrines. The difference, however, is that the latter is much more suitable in form and logically subtle. This is because the Shariah looks upon punishment as a collective necessity and a means of safeguarding public peace and tranquillity. And in applying this means of collective security, it differentiates between persons with freedom of choice and

1. *Al Badawi Al Qanoon-ul-Janai*, p. 330 and 335.

those bereft of it. In a man-made legislation opposition to the law in force and administration of justice are the basis of punishment. As this basis has been derived from the doctrine of immitation, it is logically in conflict with the liability of an unaccountable person to punishment, or with any possible sentence against him. For it cannot be said of a person bereft of choice that he violates or opposes the law made by the legislator. It so being the case, justice demands that such a person should not be called to account. The Shariah also looks upon freedom of choice as the basis of accountability and treats the person without such freedom as unaccountable. But at the same time it treats punishment as a social necessity and a means of ensuring collective security. This confers on the legislator the right to safeguard the society by punishing the accountable law-breaker and to protect the community against the criminal behaviour of an unaccountable person by taking appropriate measures against him.

It should be remembered that the foregoing concept was presented by the Islamic Shariah as long back as the seventh century; whereas the modern doctrines of man-made laws came into being in the twentieth century only. It will be untrue to claim that the laws in force today are rooted in doctrines that are absolutely new and unknown to the Islamic Shariah.

(278) The Meaning of Accountability in the Shariah

The meaning of accountability as determined in the Shariah is that man should bear the consequence of those forbidden acts which he does intentionally and with full awareness of the consequences and significance thereof. If anyone does a forbidden act unintentionally (such as may be done under duress or in a state of unconsciousness) he will not be accountable for his act under the criminal law. Again, if anyone does a forbidden act intentionally but without understanding the meaning of what he is doing, such as a lunatic or an unperceiving child does, he too will not be accountable.

To sum up there are three essential ingredients of accountability according to Shariah: (a) Commission of an unlawful act (b) Freedom of Choice and (c) Capability of perception.[1] In

1. The word 'Perception' has been used here instead of 'discrimination' for the jurists place perception a degree higher than discrimination.

the absence of anyone of these elements, the doctrine of accountability will not operate.

(279) The Meaning of Accountability in Modern Laws

Accountability conveys the same sense in the modern law as it does in the Shariah and the essential ingredients of accountability are also the same as in the Shariah. Only the deterministic modern laws are incompatible with the Shariah in this regard, but the number of such laws is very limited.

But before the French Revolution the position of modern laws was quite different. In those days criminal accountability meant that the agent was indiscriminately responsible for the consequences of his act, whether or not he was a human being, had a free will of his own and was capable of deliberation. In other words, all the man-made laws in force today follow the principle adopted by the Islamic Shariah thirteen hundred years ago.

B. Subject of Criminal Accountability

(280) Man is the Subject of Criminal Accountability

The essential condition laid down by the Shariah for the agent is freedom of choice and capability of perception; it, therefore, necessarily follows that man alone is the subject of criminal accountability, because it is man and only man who is endowed with the capacity to perceive and choose. The animals and plants lack freedom of choice and perception and as such cannot be the subject of accountability.

Again, accountability is confined to the living man. A dead person ceases to be accountable because he cannot perceive and do an act of his own accord. Besides, one of the principles of the Shariah is that death annuls responsibilities.

If man, then, is to be treated as accountable on the basis of choice and perception, he must be sane, major and having free will. In the absence of these qualities he cannot be accountable. Again, if a person does not reach a certain age, it cannot be said of him that his perception and capability of choice is fully mature. Thus children, insane persons and anyone who has lost his capacity

to perceive are not accountable. Similarly one acting under duress are subject to violence is exempt from accountability.

Institutional Persons

The Shariah has been familiar with institutional persons right from its very beginning. The jurists treat Baitul-Mal and Trust as institutional persons. Similarly schools, asylums and hospitals are regarded by them as institutional persons entitled to right and to exercise thereof. But such persons are not treated as accountable because the springs of accountability lie in discretion and freedom of choice, which are not to be found in institutional persons. But if an individual in charge of such an institution is guilty of a forbidden act, he will be liable to punishment even if he commits such an act in the interest of the body under his control.

An institutional person may also be punished in a manner that its brunt is borne by the person who is in charge thereof or the persons who represent it as a body. Thus by way of punishment an organization may be wound up, dissolved, destroyed or its assets confiscated by the government. It may also be possible that such restrictions are imposed upon the institutional persons as may put an end to those of their activities which are inimical to the society.

The Shariah has been acting on the principles discussed above for thirteen centuries, while man-made laws treated man, plants and animals alike as the subject of accountability for centuries together. They did not differentiate between the living and the dead, the perceiving and the unperceiving, the free and the restrained. Only the offender was the focus of their attention and that was the reason why the sensible and grown up people, unperceiving children and lunatics were indiscriminately punished for their offences. If acts could be imputed to animals and plants, these were also subjected to punishment. Now that the fundamentals of man-made laws have undergone changes they have come to regard only living and sensible persons enjoying freedom of choice as accountable for their acts. On this point the man-made laws have harmonized themselves with the Islamic Shariah.

(281) Personal Accountability

One of the fundamental principles of Islam is that criminal accountability is purely personal and only the person committing an offence is responsible for it and no one else, even if he be the closest relation of the offender. The Quran has laid down this principle in many of its verses:

"Each soul earneth only on its own account" (7:165)

"And no burdened soul can bear another's burden." (35:18)

"And that man hath only that for which he maketh effort." (53:39)

"Whoso doeth right, it is for his soul; and whoso doeth wrong it is against it (his soul) (41:46)

"He who doeth wrong will have the recompense thereof." (4:123)

Traditions of the Holy Prophet may also be cited to substantiate the above principle. One of his traditions in this context is:

"No person should be apprehended for an offence committed by his father or brother."

Again the Prophet is quoted as saying to Abu Ramsa and his son:

"He does not commit any offence against you, nor do you commit any offence against him."

The Shariah has meticulously applied the principle of personal accountability right from its beginning. There is no exception to this rule save one which relates to *diyat*. In accordance with this exception the brunt of compensation is to be borne by the members of the offender's family in cases of quasi-wilful homicide or homicide committed by error. The basis of this exception is also pure justice, that is, the basis on which the principle of personal punishment rests; for personal punishment in the case of quasi-wilful murder or murder committed by mistake is absolutely unjust. It is in fact cruelty.

Some of the jurists do not treat the imposition of *diyat* on the members of the family under the principle of personal punishment as exception. The reason for this according to them is that *diyat* is not imposed on the family because it is held

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responsible for the offence committed by the offender. In fact, the impact of compensation in such a case, too is on the killer himself. The members of the family, however, have been enjoined to share the burden of compensation with the offender as an expression of familial sympathy, without incurring responsibility for any part of the offender's crime. Allah provides for the right of the poor to the possessions, of the rich, not as a penalty for any fault of the latter but as an expression of sympathy with the poor. In exactly the same way the family members of a killer committing homicide by mistake are commanded to bear the burden of compensation payable to the heirs of the victim. This causes no hardship either to the family members of the killer or killer himself, since every member has to pay an obligatory share of the *diyat* three *diyats* or if the payment spreads over a period of four years, four *dirhams* in all. In short, the family member of the killer guilty of murder by mistake are called upon to act benevolently. It had been a custom among the Arabs during the pre-Islamic period to share the burden of compensations in this way and this custom bad been regarded the most commendable habit and the best way to demonstrate humanitarianism. And the Prophet has said:

> "I have been sent for the perfection of moral virtues." In fact such act is practically popular and rationally commendable.[1]

The modern laws in force have adopted the principle in question. They call to account only the person guilty of an offence and punish him accordingly. But they have to apply it as yet in its entirety. If you study the provisions of any modern law systematically, you will see that in many cases it militates against the principle mentioned above. For instance, according to the Egyptian law, if in an assembly of the people anyone commits an offence with the intention of achieving the objective of the assembly, everyone who attends it with the knowledge of the purpose thereof is under the obligation to account for the offence. Similarly the organizers of a meeting will be accountable for every offence committed by organizers of a meeting will be accountable for

1. *Al Ahkam-ul-Quran. Abu bakr Al Razi Al Jassas,* Vol. 2, p.224.

every offence committed by anyone attending the meeting. But if the above principle is put into effect in all its aspects they will not bear the responsibility of the offence so committed except that they agree to its commission or incite the offender to commit it.

The Egyptian law also contains certain other cases, like penalizing other persons for the act of actual offenders, which are repugnant to the principle of personal accountability. For instance, under the above law the editor of a magazine is regarded as accountable for whatever is written in it even if he is not present. Again, those who run betrothals are accountable for the violation of sections 13,14,15, and 19 of the Egyptian anti-prostitution act. Similarly the owners of the places where certain offences are committed are held responsible for them. The father or guardian of a child who is guilty of a criminal act and is ordered to be handed over is accountable under section 69 of the Egyptian criminal law if the child under his care commits another offence before the expiry of a period of one year from the date when such an order is issued.

The explanation offered by the scholars of modern law to these cases is that punishment awarded for the crime committed by the offender himself and not by someone else. The answer to this explanation is that the actual offender's punishment evidently calls for a separate law; whereas in the cases referred to above he is penalized for offences committed by another person and wherein he has no share at all.

The doctrine of personal accountability was not found in the man-made law in its modern form before the French Revolution. In those days a person was accountable for his own act as well as for that of another person even if he knew nothing about the latters act or had no control over the agent thereof. Again the punishment of an offence passed over the offender to his family members and friends, who shared punishment with the offender in spite of their acquittal.

Although the principle of personal accountability has now been incorporated in the modern laws, yet it appears from what has been stated above that these laws have not been able to apply

it comprehensively as the Shariah has done and that the sphere of its applicability is very limited as compared to the Shariah.

(282) The Aggrieved Person

Aggrieved person may be defined as one against whose life and property or against any of whose rights an offence[1] has been committed. According to the Shariah it is not necessary that an aggrieved person like an offender should be rational and enjoy freedom of choice. An offender is accountable as the commission of the offence is in his power and his accountability is the outcome of his violation of the injunction[2] of the law-giver. The injunctions of the law-giver are meant for only the person who is rational and has the freedom to choose. But the aggrieved person cannot be held responsible as he is the victim of crime. The offender deprives him of his right. Now possession of a right by anyone does not presuppose his rationality and freedom of will, although he should be qualified to have that right.

Crimes give rise to two kinds of rights: The rights of Allah and the rights of individuals. The former rights emerge from crimes bearing on the common weal and the social order; while the right of individuals stem out of crimes affecting the rights of the individuals. From this view-point an aggrieved person may be any human being whether capable of perception or incapable thereof and of sound or unsound mind. Moreover, an aggrieved person may constitute a group of people such as a group wronged

1. The Arabic word, used in the original text is 'Janayat' which means an offence regardless of the quantum of punishment.
2. Injunctions whose violation is punishable are divine commands the edicts of the Holy Prophet or the orders issued by competent authority such as the Caliph or the Sultan. If the injunction is a divine command, its obedience is binding because of its being obligatory and enforced. If it is an edict of the Holy Prophet or an order of the competent authority, it must be followed because Allah has enjoined obedience of the Prophet and the competent authority and not because it has been made directly obligatory by the Prophet or the authority.

   "O ye who believe Obey Allah and obey the messenger and those of you who are in authority." (4:59)

   In other words the Prophet or the person in authority is to be obeyed since it has been made obligatory by Allah. For this reason any command of the person in authority inconsistent with divine injunction or Prophet's decree is not binding. In fact, such a command would be absolutely invalid.

   Please see *Al Mustasfa lil Ghazzali* Vol. 1, p. 83 and *Sharh Musallim- us-Suboot li- Abdul Ali Al-Ansari*, p. 25 and the following page.

by another group. Again, an aggrieved party may comprise the entire society as in the case of adultery and apostasy.

An aggrieved party may also comprise an institutional person just as it may consist of a concrete person, as in the case of stealing property belonging to a company, trust or the government.

In the case of an animal or any property consisting of inanimate objects or a creed being the subject of accountability, the aggrieved party will comprise the animal or the owner of the property or the authority upholding the creed identified with the creed, as the case may be.

In short, man is the aggrieved party in all circumstances, whether as an individual or a member of a body. The Shariah treats any human being as an aggrieved party even if he is still in his mother's womb. Thus if a person inflicts a wound[1] on the stomach of pregnant woman, thereby causing abortion, he will have wronged two human beings at the same time by wounding the mother's stomach and committing foeticide. Such a person will therefore, be liable to two punishments; the one being a part of compensation for cutting the stomach of the mother and the other being *diyat* for the destruction of the embryo.[2] If the mother herself causes abortion by taking a contraceptive she will have to pay *diyat* for the unborn child.[3]

Opinions differ on the question of foetus. Some scholars maintain that foetus is that which a woman discharges in the form of a lump of flesh and which indicates that it is an embryo. Others hold that foetus is a well formed embryo.

There are others who go a step further and say that foetus consist of an animated embryo.[4]

1. The original term of jurisprudence is *'Jaifa'* meaning a deep wound inflicted on the chest or stomach.
2. (a) *Mawahib-ul Jaleel*, Vol.6, p.257.
   (b) *Bada'e-wal-Sna'e*, Vol.7, p.325.
   (c) *Asna- ul- Matalib*, Vol.4, p.89.
   (d) *Al Mughni* Vol.9, p.535 and 542.
3. (a) *Mawahib-ul-Jaleel* Vol.6, p. 1258.
   (b) *Asna-ul Matalib* Vol.4, p.92.
4. *Hidayath-ul-Mujthahid*, Vol.2, p. 292.

One of the principles of the Shariah is that death reduces the human personality to nothingness. If man dies, he ceases to exist and all his property and rights are transferred to his creditors and heirs.

If a man's self, property and rights are the object of offence, he can be subjected to criminal acts in two respects;

(1) Outrage against the Remains of the Dead

An act of outrage against the dead body of a human being and the remains thereof does not constitute an offence committed against a living person; nor can a dead man be an aggrieved party. Outrage against the remains of a dead body is prohibited because the deceased is held in respect by the community as well as the individuals. Thus it is the community which constitutes the aggrieved party in a case like this and the Shariah punishes the offender committing outrage against the dead because he is guilty of profaning the dead and desecrating the graves.

(2) Calumniation of the Dead

One of the primary principles of the Shariah is that no false case of calumniation against a person can be instituted unless person prefers a complaint: for the crime of calumniations is in separable linked with the aggrieved party as it prejudices his reputation and prestige. The calumniator has the right to produce facts bearing testimony to the charge levelled by him. If he proves the charge, the accused will be held responsible for whatever he is accused of and will accordingly be punished. For this reason institution of legal proceedings against the calumniator has been made defendant on the complaint of the aggrieved person. If the calumniated person prefers a case the trial of the slanderer will start. If he is alive at the time when the charge is brought up against him then it is he alone who has the right of prosecution against the slanderer. If the aggrieved person dies after a charge is brought against him and before preparing a case, his heirs and close relations like brothers, paternal uncles etc will have no right to prosecute the slanderer; nor can they prefer a complaint against him except that the calumniated person dies before coming to know about the slander. But should he die after preferring a complaint, his heirs will, according to Imam Malik, Shafi'ee and

Imam Ahmed, succeed him to continue the legal proceedings Imam Abu Hanifa, however holds that with the death of the aggrieved person, the ease becomes defunct, because the right of prosecution in the ease of slander does not constitute the right to any property to be inherited.

If a man is calumniated after his death, then most of the jurists would allow the prosecution of slanderer on the complaint of his heirs, lineal relations and descendants. The jurists argue that calumny passes from the deceased over to his living heirs. Since the slanderer casts aspersion on the lineage of the deceased he calumniates, by implication, his heirs also. For this reason the heirs have the right to disprove the charge levelled against the deceased in order to be exculpated of the slander. Some of the jurists, however, hold that it is only the ancestral lineage and the descendents of the deceased on whom as person is cast and, therefore, it is only they who have to prosecute the slanderer. But others hold that aspersion is cast on all the heirs of the deceased and, therefore, all of them have the right to prosecute the slanderer. In short, whoever, has the right of prosecution may sue the slanderer without waiting for any other person having similar right to do it. In other words, if a close relation of the deceased does not proceed against him, then a distant relation may.[1]

The reason given by the jurists for the prosecution of the slanderer is that it is designed to exculpate the heirs of the deceased and that a distant relation has the right to sue the slanderer in presence of a close relation. It follows then that the refutation of the charge is actually intended for the support of the living relations rather than of the deceased himself and for clearing his relation, and not the deceased, from the stigma caused by the slander, particularly in view of the fact that calumny passes from the person stigmatized to others.

In the Shariah calumny or slander means denial of the descent of the person stigmatized or allegation of adultery against

1. (a) *Mawahib-ul-Jaleel*, Vol. 6, p.305
   (b) *Al Zela'ee*, Vol.3, p.203-204
   (c) *Al Sharh-ul-Kabeer*, Vol. 10, p. 230 and the following.
   (d) *Al Muhazzab*, Vol. 2, P.292

him. And denial of descent of a person, whether man or woman, would prejudice his ancestory as well as his progeny. If a woman is accused of adultery, her ancestors and descendants will obviously be prejudiced.

(283) Difference between the Shariah and Modern Laws

The Shariah and the modern laws are in agreement in respect of what has been stated about aggrieved party. Thus according to the modern laws as well, a man incapable of perception, a sensible person and a lunatic may become an aggrieved person. Similarly an institutional person may be an aggrieved party just as a concrete person. The modern laws also provide for the protection of a child in embryo and for the punishment of the person guilty of foeticide or abortion. Moreover, these laws like the Shariah contain provisions for the preservation of the dead body and the remains thereof, and lay down penalty for the desecration of the graves.[1] In such matters, then, the modern Laws are in harmony with the Shariah.

The common notion about the calumniation of the dead is that the laws are framed for the living and not for the dead.[2] Therefore, no penalty is laid down for the calumniation of the dead save when calumny casts aspersion on the heirs and living relations of the deceased as well. If it affects them, there is nothing to impede judicial proceedings and awarding punishment to the slanderer.[3]

There are some laws wherein institution of legal proceedings is not stipulated by preference of complaint by the person stigmatized or by his heirs. This is the position of the Egyptian Law. But according to other laws no proceedings can be instituted without the complaint of the person stigmatized. The French Law is an example. Under this law the right of complaint becomes null and void with the death of the aggrieved person except in case if the calumniation of the deceased is designed to cast aspersion

1. *Egyptian Penal Law,* Sections 260 and 264.
2. *The Egyptian Penal Law,* Section 160.
3. (a) *Ahmed,* p.544 and p. 555.
   (b) *Ahmed Safwat, Al Qanoon-ul-Janai,* p. 153 and what follows.
   (c) *Sharh Qanoon-ul-Uqoobat,* by *Kamil Mersy,* p. 358.

on the family and living relations of that person. In such a case, the relations of the deceased have the right to prefer a case in their own name.

The position of modern laws as to the calumniation of the dead is not different from that of the Shariah. According to the Shariah a case of calumny always prejudices the family and the relations of the person who is stigmatized by the slander. That is why the Shariah unconditionally allows his family members and other relations to seek legal remedy for the slander. This exactly is the position of the modern laws which permit the heirs of the defamed person to sue the slanderer, provided that they are also stigmatized by the calumny. But in these laws calumny does not mean merely the false accusation of adultery and unwarranted denial of lineage as is meant in the Shariah. They employ the word in a much wider sense. According to them a slanderer is one who imputes to another person something designed to debase him. It is admitted that most of the things regarded as calumny in modern laws do not prejudice the heirs and relations of the person stigmatized. But false accusation of adultery and unwarranted denial of descent do affect the heirs and living relations of the aggrieved person. Hence it may be concluded that the modern laws also provide for their right to seek legal remedy in the case of a false charge of adultery and groundless denial of descent. The French Law contains a provision making legal proceedings dependent on the complaint of the stigmatized person and this accords with the Islamic Shariah. But according to some other laws like the Egyptian law relating to the institution of legal proceedings, prosecution of the slanderer is not stipulated by the preference of complaint.

C. The Cause and Effect of Criminal Accountability

(284) The Cause and Condition of Criminal Accountability

Cause is that which the law-maker has described as the sign of effect and has linked the presence and absence of effect with the presence and absence thereof in such a manner that with

the presence and absence of the cause the effect emerges and disappears.[1]

The term condition in the Shariah means that on which an injunction of the Shariah hinges. If condition in this sense is absent, then the injunction is invalid.[2]

The cause of criminal accountability is commission of crimes i.e., commission of acts prohibited and omission of acts enjoined by the Shariah. In declaring commission of crimes the cause of criminal accountability the Shariah lays down two self-subsistent conditions as essential for criminal accountability. These conditions are perception and freedom of choice. In the absence of the either condition accountability does not exist. Presence of both the conditions is essential for accountability. Larceny, for instance, is a crime constituting an act which the Shariah forbids and prescribes the punishment of the amputation of hand for the person guilty thereof. Now if a person steals the property of another person, the act which constitutes the cause of accountability does occur, but the agent will not be treated as accountable under the Shariah unless he fulfils the two essential conditions mentioned above i.e. he is capable of understanding and has the freedom of choice. If he is devoid of perception, as a lunatic is, he is not accountable. Again, if he is capable of perception but does not have freedom of choice he cannot be treated as accountable either.

If the cause of accountability, viz.; commission of crime along with both the essential conditions, the agent will be deemed an offender and his act will be regarded as the violation of the law-maker's command. He will therefore, be liable to punishment laid down for the offence he is guilty of. Obiously, if the offence is not committed and both the essential conditions are absent then the person involved is no offender and whatever deed he may have done does not constitute a crime. Thus accountability in the Shariah presupposes commission of crime and its absence is inseparably linked with the absence of crime.

Connotation of crime in the Islamic Shariah runs parallel to the interpretation of offence in the modern law. But in the sense of violation of law-maker's command, its interpretation is

1. *Abdul Wahab Khallaf* — The Principles of Fiqh, p.9.
2. *Ibid* p.93.

subtle and comprehensive. As opposed to it the interpretation put on the term offence in the modern law both in the sense of intentional and unintentional violation of the lawmaker's command is ambiguous.

(285) Degrees of Accountability

Since criminal accountability pre-supposes disobedience of the law-maker the degrees of accountability are governed by the degrees of disobedience.

The basis of this problem is the position of the Shariah as to the will of the agent. The Shariah invariably links agent's acts with his will. The Prophet makes this clear in one of his traditions:

"Acts are dependent on intentions and everyone will get his reward in consonance with his intention."

The seat of will is mind and it means intention and decision. For instance, the Arabs when 'wishing someone well, say "May Allah propose to protect you." Thus if a person proposes to do an act and does it, he is intentionally guilty thereof.

In declaring the accountability of the offender for the application of the principle that acts are linked with intention, the Shariah does not only take into account the offence but also the offender's will.[1]

Offences that can legitimately be imputed to a person who is subject to accountability because of his understanding and freedom of choice may be divided into two categories.

First, the offences which man commits deliberately with the intention of violating the command of the law-giver. Second, offences which he erroneously commits unintentionally having no intention at all of violating the command of the law-giver.

Evidently the first kind of offences are those which are committed intentionally, while the second kind of offences are, those which are committed unintentionally.

Since the Islamic Shariah regards action as dependent on intention, it draws a line of distinction between offender's

1. (a) *Al Moq'een*, Vol.3, p. 101 and 104.
   (b) *Al Ahkam fil Usool-ul-Ahkam lil ibn-Hazm*, Vol. 5, p. 41 and following pages.
   (c) *Al Ishbah wan Nazar*, p.8 and the following pages.

accountability owing to the offence committed willingly and his accountability due to the offence erroneously committed. On this ground it deals severely with the accountability of the offender intentionally guilty and lightly with the accountability arising out of erroneous act. It deals severely with the accountability of one intentionally guilty because he commits the offence willingly and heartily and therefore commits it in full. It takes a lenient view of the accountability of one erroneously guilty because he commits the offence by mistake and, therefore, his offence is incomplete.

The Holy Quran itself differentiates between the two kinds of offenders:

> "And there is no blame on you concerning that wherein you made a mistake, but concerning that which your hearts do purposely." (33:5)

Also, the Prophet says:

'My Ummah is not accountable for what it does by mistake and inadvertently."

The Quranic verse and the Prophet's Tradition cited above do no aim at total nullification of accountability. They rather mean to mitigate it in the case of one erroneously guilty and to show that his accountability is not of the same order as that of an offender who commits an offence willingly. This is borne out by the fact that Allah prescribes *qisas* as penalty for wilful murder, while laying down *diyat* and expiation as penalties for murder committed by mistake, thereby treating several with the accountability of one intentionally guilty and leniently with the accountability of one erroneously guilty. But Allah does not nullify the accountability of the latter altogether. Says He:

> "O ye who believe! Retaliation is prescribed for you in the matter of the murdered." (2:178)
>
> "And We prescribed for them therein the life for the life." (5:45)

Again,

> "It is not for a believer to kill a believer unless it be by mistake. He who hath killed a believer by mistake must set free a believing slave and pay the blood-money to the family of the slain, unless they remit it as a charity. If the victim

> be of a people hostile unto you, and he is a believer then the penance is to set free a believing slave. And if he cometh of a folk between whom and you there is a covenant, then the blood-money must be paid unto his folk and also a believing slave must be set free." (2:92)

In short, criminal accountability and its degrees vary with the numerous degrees and diversity of offeneces. It is, therefore, necessary to be familiar with the variety and degrees of offences in order to be acquainted with the diversity and degrees of accountability.

The disobedient person violates the command of the law-maker either intentionally or by mistake. Hence mistakes and wilful acts are two different kinds of offences. Wilful offences are also of two kinds: wilful and quasi-wilful. Similarly mistakes are also of two kinds: error an act subject to the injunction of error. Accordingly there are four levels of accountability. As accountability is grounded in offence, the severity and mildness thereof corresponds to the higher and lower levels of offence.

(1) Intention means willingness of the offender to commit an offence heartily

For instance, if a person drinks wine with the intention of drinking it he does it willingly or if a person commits larceny with the intention of stealing something, he commits it willingly. Intentional offence is the offence of the highest order and the Shariah accordingly provides for it relentless accountability and severe punishment.

The jurists of Islam use the word 'Wilful' in the context of homicide' in a specific sense. According to them wilful homicide connotes both the intention of the offender to commit homicide as well as aims at the result of what he intends. They differentiate between homicide in this specific sense and what is generally meant by homicide. The first kind of homicide is termed by them as wilful murder and the second as quasi-wilful murder.

(2) Quasi-wilful murder:

Quasi-wilful murder consists of only murder and a crime of lesser degree[1] than murder. The jurists differ on this kind of

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homicide also. Imam Malik says that there is no such thing as quasi-wilful murder in the case of homicide or a lesser crime. He argues that only two categories of homicide are mentioned in the Holy Quran viz-wilful murder and murder committed by mistake. To add a third category would be tantamount to the addition of a new injunction to the Quranic provision. The Quran provides that:

> "Whoso slayeth a believer of set purpose his reward is Hell for ever."

Again,

> "It is not for a believer to kill a believer unless it be by mistake."

On the basis of this provision Imam Malik regards wilful murder as homicide committed with the intention of violating the Quranic injunction. He does not stipulate that wilful murder should also be the intended result of the offender's wilful crime.[1]

The other Imams Abu Hanifa, Shafi'ee and Ahmed[2] do acknowledge quasi-wilful act involved in a case of murder but they differ on the presence of quasi-wilful act[3] element in lesser crimes than homicide, like infliction of physical injury, wound and breaking of limbs. Imam Shafi'ee holds that both wilful and quasi-wilful element may be involved in such a crime. Most of the jurists belonging to the Hamblite School subscribe to this view.[4]

On the contrary Imam Abu Hanifa[5] is of the view that crimes of a lower order than murder (injuring, wounding etc) do not involve quasi-wilful act. Some of the Hamblite jurists also hold the same opinion.[6]

The implication of a quasi-wilful act involved in a case of murder is that the killer intends to commit homicide with the intention of disobedience but he does not mean that homicide

1. *Mawahib-ul-Jaleel,* Vol.6, p.241.
2. (a) *Nihayat-ul-Muhtaj,* Vol.7, p.235.
   (b) *Al Mughni* Vol.9, p.320.
3. *Al Umm,* Vol.6, p.6 and p.45.
4. *Al Iqnaa,* Vol.4, p.189.
5. *Al Bahr-ul-Raiq,* Vol.8, p.287.
6. *Al Mughni,* Vol.9, p.41.

should result which actually does result from his act and the victim dies. The Imam acknowledging the presence of quasi-wilful element cites the following Tradition of the Holy Prophet in support of their position:

> "Compensation for the life of a person killed by wilful error such as flogging beating with a piece of wood or stoning is a hundred camels."[1]

A crime is called quasi-wilful because it both involves and does not involve intention on the part of the offender, for he does intend to commit the offence but the offence which does actually result from his act is not intended by him.

In a crime lesser than homicide, quasi-wilful act means what the agent intends to do culminates in something which he does not intend.

It is needless to say that a quasi-wilful homicide is a crime of lower order than wilful homicide and, therefore, the penalty entailed by it should accordingly be higher. For this reason the penalty laid down for wilful homicide is *qisas;* and that prescribed for quasi-wilful homicide is *diyat* or penal punishment as the court may deem fit.

(3) Offence Committed by Mistake

Mistake (as the word connotes in the Shariah) is a wrongful act committed by the offender unintentionally, whether he errs in his act or intention. For instance, he shoots an arrow aiming at a bird but hits a human being. This is a mistake involved in the act. But he will err in his intention if he shoots the soldier of his own country mistaking him for an enemy soldier as that soldier happens to be in the enemy lines dressed in a uniform similar to that of the enemy.

(4) Offence Subject to Injunction Pertaining to Mistake

Offences in the nature of the following two cases also fall under the category of mistake. First, a person guilty of homicide does not intend to commit it but homicide, does occur on account of a lapse or carelessness in his action. For instance,, a person in sleep turns upon a baby lying by and kills it. Second, an offender causes an unlawful act without intending it. For instance a person

1. *Al Zela'ee,* Vol. 6, p. 97.

digs a ditch on the roadside for the accumulation of water and a passer-by falls in it.

A pure mistake constitutes an offence of higher order than an error subject to the injunction relating to mistake; for in the former offence the agent intends to do an act and a lapse or carelessness on his part results in something unlawful whereas in an error subject to the injunction of mistake the agent does not intend to do the act which ensues from a lapse or carelessness on his part or by his incidentally being the cause of the offence.

Abu Bakr Razi was the first to notice the difference between the two kinds of erroneous offences. He points out that in a simple offence committed by mistake the act is intentional but error is involved sometimes in the intention of the agent and sometimes in his act but this is not the case with the act of an inadvertent or sleeping person or with one who incidentally becomes the cause of offence. The reason for this is that in none of the cases referred to, the real act is intended so that it may be treated as a criminal error. Since an inadvertent or sleeping person and one who becomes the casual factor fall under the category of mistake in respect of reward. Imam Abu Bakr Razi brackets them with those guilty of mistake.[1]

(286) The Shariah vis-a-vis Modern Laws

The position of modern laws as regards the cause and condition of accountability is in harmony with that of the Shariah. According to these laws the cause of accountability is commission of crime, while the condition, thereof is perception and freedom of choice respectively. Accountability is incurred only when the offender is guilty of felony or crime. The degree and diversity of accountability directly vary with the degree and plurality of the crime. The modern laws divide offences into two categories. Wilful offence and mistake. The latter is further divided into two kinds: error due to inadvertence and simple error. Matters covered by the provision pertaining to wilful offence fall under the same category as those classified in the Shariah as wilful and quasi-wilful offences; while matters subject to the provision as to error are indentical with those which the Shariah regards as mistake and as acts subject to the provision pertaining to mistake.

1. *Abu Bakr Al Jassas, Ahkam-ul-Quran,* Vol.2, p.223

Although the modern laws contain no provision for quasi-wilful offence, yet they reckon it as a fatal blow or injury resulting in the death of the victim and prescribe for it a lighter penalty than one laid down for wilful homicide. Thus the modern laws have realized the objective set by the Shariah i.e. it draws a line of distinction between homicide caused by an intentional injury and homicide resulting from intentional attempt on the life of the victim. The difference between the Shariah and the modern laws on this point is only a matter of terminology.

Doubtless the Shariat concept of the quasi-wilful homicide is more logical than what is meant by it in the modern law. Quasi-wilful homicide is inclusive of every murder caused by injury administration of poison to the victim or giving him something harmful, burning him, throwing him from a height or stifling him. In fact, the forms of wilful homicide involving the agent's intention to do wrong but not to kill fall under the category of quasi-wilful murder: for the very definition presupposes employment of any method that may result in the death of the victim. Hence the view of the jurists of Islam that the outcome of all the forms of cruetly and torture is death presents the most satisfactory explanation.

What is meant by the quasi-wilful murder in the modern law is confined to the infliction of a fatal blow with the hand or a weapon to the exclusion of other method employed in homicide such as drowning, burning to death hurling down from a height or stifling to death.

D. Intention of Crime or Defiance

(287) The Intention of Crime or Defiance

It has already been stated that the basis of criminal accountability is the defiance of law-maker's edict and that the degree of the offender's accountability varies with the degree of defiance. Accordingly if the offender intentionally defies the legislator's mandate, he will be awarded severe punishment; but if the defiance is unintentional the punishment will be lighter. In other words, the offender's intention will be the primary factor in the determination of punishment offender's intention is called in modern termindogy as criminal intent.

Criminal intent means willing of a person to do a prohibited act or refrain from a mandatory act knowing that the act he is going to commit or omit is or mandatory forbidden as the case may be. At this point the difference between defiance (offence) and the criminal intent must be taken into account. Defiance of law is essential for every offence to be an offence, whether a major or minor offence and wilful offence and criminal error. No act can be an offence without an element of defiance, but criminal intent is the essential condition of wilful crimes. Defiance means commitment of offence and offence means commission or omission of an act prohibited or enjoined, whether or not the agent intends to defy. For instance, someone throws a stone out of the window and it hits a passerby in the street. This act does constitute an offence but the agent never means to injure the passerby or has the intention of committing the offence. Criminal intent is to make up one's mind to commit or omit an act which one knows is forbidden or enjoined, or to commit an offence with the intention of defying the law. Let us illustrate this with reference to the example given above. Suppose the person throwing a stone out of the window does it with the intention of killing someone and it hits him. The agent in this case is not only guilty of an offence but also commits it with criminal intent. In both the cases a crime is committed with the difference that in the first case the crime is devoid of criminal intent while in the second case such an intent is present.

The difference between an offence and criminal intent is the same as the difference between intention and purpose. Criminal intent implies wilful commission of a prohibited act in substance. Purpose means the intended outcome of such an act. Doubtless, the interpretation put by the Sharian on the term 'offence' for the commission of a substantial act on the one hand and for the intended result of such an act on the other is much more subtle and comprehensive than its legal connotation. For there is little difference in the dictionary meaning between the words intent and purpose. In fact they are synonymous. Both of them may signify the intention of the act as well as the proposed result thereof. Their synonimity does not only render their technical connotation ambiguous but also often create difficulty in differentiating between their meanings.

The criminal intent or the purpose of offence is present in the mind before the offence is committed. For instance, he makes up his mind to kill someone and does kill him after sometime. But sometimes the idea of committing the offence enters his mind just when he commits it. This generally happens in a riot or brawl and he commits the offence all of a sudden.

It makes no difference in the Shariah whether the criminal intent precedes the offence or synchronizes with it. In either case the penalty is identical; for the quantum of punishment hinges upon the intention of the offence already committed and it will, therefore, be unjustified to award a severe punishment for intending in advance to commit the offence as it would amount to awarding a separate punishment for criminal intent. Such a punishment would be inconsistent with the principle of the Shariah that the idea and intention of criminal act which is present in the mind of the offender before the commission thereof entails no punishment. This principle is substantiated by the following Tradition of the Holy Prophet:

> "Allah condones all those sinister ideas coming into the minds of the members of my Ummah which they have not expressed or put into practice."

That is why the Shariah draws no line of distinction between homicide or infliction of injury decided upon before hand and unpremeditated homicide or injury and lays down identical penalty in both the cases. Thus the prescribed punishment for murder is *qisas* whether it is premeditated or not. Similarly, same punishments have been laid down for breaking the victims head or infliction of injury on him respectively, regardless of their being decided upon in advance or intentionally committed without premeditation.

In the modern laws also no punishment has been laid down for intention divorced from the offence. Nevertheless, these laws do take into account in certain cases the fact whether or not the offence committed is pre-planned. For instance, he takes into consideration this distinction in cases of homicide injury and infliction of wound.

(288) Distinction between Criminal Intent and Motive of Crime

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intent and the motive of crime right from its very beginning but has not admitted of the bearing of the motive on the commission and constitution (Pattern) of the crime and the punishment entailed by it. Thus it matters little in the Shariah whether the motive of offence is noble, just as killing in retaliation for the murder of one's next of kin or for the indignity suffered at the hands of the victim, or whether the motive is ignoble just as killing in lieu of pecuniary compensation or to commit larceny. In other words the motive of crime has nothing to do with the criminal intent; nor does it affect the pattern of crime or its punishment.

It is practically possible to reject the effect of motive so far as the *hud* and *qisas* offences are concerned but it is not so in thc case of penal punishments. The motive does not affect the *hud* or *qisas* offences because the law-maker has confined the powers of the court to the prescribed punishments admitting of no consideration of the motives behind the commission of offences. But in the case of penal punishments the law-maker empowers the court to determine the quantum of penalty and choose the kind of penalty so that it may be possible for the court to take into account the motives of offences in the determination of the quantum of punishment.

In short, motives may affect only the penal punishments. The reason for this is that the Shariah has not specified penal punishments, conferring wide powers on the court in respect thereof so that it may be able to choose any punishment and determine its quantity and thereby award within the limits of its powers severe or milder punishment as it may deem fit, keeping the motives in view. In the case of *hud* and *qisas* offences punishments have been specifically prescribed and the court is incompetent to enhance or reduce them. Whatever the motives, noble or ignoble, these punishments are not amenable to change.

Most of the modern laws are in consonance with the Shariah in this matter. They too do not confound the motive of crime with criminal intent but rather reject the effect of the motive on the offence or its punishment as a general rule. However, in spite of this general rule the court enjoys the power to keep in view the effects of the motive in the determination of punishment; for the court is competent to choose any penalty between the maximum

and minimum punishment which it deems proper. In most cases it is also empowered to choose between two alternate punishments and fix its quantum in accordance as the offender deserves. The court moreover, enjoys the power to take into account the motive of the crime along with the circumstances of the offender and his offence and to reduce the punishment or enhance it if it thinks the offender so deserves and thus accept the effect of the motive on the punishment. This at any rate is the position of modern Egyptian and French laws.

However, there are certain modern laws such as those of Italy and Poland[1] which acknowledge the motive of crime as a cause of reduction and enhancement of punishment and enjoin upon the court to take this cause into account in determining the penalty. Although these laws accept the legal effect of the motive on the punishment yet the results of this approach is practically the same as are produced by those laws which theoretically reject the effect of motive on punishment; for the court cannot practically overlook the motives of crime in determining the punishment, whether the law in force accepts their effect or not.

In other words the difference between the man-made laws in force and the Islamic Shariah is that the latter does not recognize the effect of motives in the case of serious offences prejudicial to the society and public order; but in the case of other offences, there is nothing in the Shariah inhibiting the court to take into account the motive of crimes although it does not theoretically admit of its effect on punishment. Most of the modern laws, too, ignore the motive and theoretically abstain from accepting its effect. But they too do not contain anything preventing the court from giving due consideration to the motive in the case of serious as well as ordinary crimes. Doubtless the approach of the Shariah to this problem is the best and preferable to that of the man made laws, since the Shariah regards collective interest as of paramount importance. It does not empower the court to keep the offender's interest above the common weal allowing personal predilections and desires to govern the public interest.

1. *Ali Badvi, Al Qanoon-ul-Janai, p.* 340 and the following Pages.

(289) The Forms of Criminal Intent

There is not any single determined form of criminal intent. It assumes diverse forms varying with the variety of forms. In some cases it is common and in others specific, in some cases definite and in others indefinite, in some direct and in others indirect.

(290) Common and Specific Intents

In the case of common intent the offender decides to commit an offence being conscious of the fact that what he is about to do is an unlawful act. In most offences common intent is sufficient accountability. For instance, in a criminal act of inflicting wound or minor injury it is sufficient that the offender has the intention of committing an unlawful act in a concrete form.

But in the case of certain other offences common intent does not suffice. Herein the law-maker has rather laid down the condition of specific result or cause a definite injury by the forbidden act which he proposes to commit. This is the case with crimes like wilful homicide or larceny. Thus in the case of murder it is not sufficient that the offender should strike the victim or deal out a blow to him knowing that infliction of wound or injury is a prohibited act. In such a case, it is necessary that the criminal intent includes the offender's will to kill the victim by inflicting a wound or causing an injury. In other words, according to the Shariah the offence must only have common intention for his accountability but must also subsequently have the specific intent or the element of will to produce a specific result in the case of wilful murder. If only the common intention is present and the victim dies as the result of the offence, then the homicide would constitute a quasi-wilful murder and not wilful murder.[1] Similarly, in a case of larceny it is not only sufficient that the thief stealthily takes away something valuable belonging to another person knowingly that he is committing an unlawful act but also

1. Imam Malik does not attach the string of specific intent in the case of homicide as he does not recognize any such thing as quasi-wilful homicide. With him there are only two kinds of homicide: wilful murder and murder committed by mistake. A man who commits murder with the intention of injuring or wronging the victim, he is guilty of wilful murder all the same whether or not he specifically intends to take the life of the victim. According to the Imam common intent is sufficient for accountability in the case of murder.

that he should deliberately want to own the thing. If he takes it without meaning to own it, he is guilty of larceny.

In cases involving the condition of specific intent, the criminal intention coincides with the motive of crime. For instance, if a person kills another person standing in his way in order to get rid of him, his specific intent would coincide with his motive; but it cannot be said of the motive to have hearing on the offence or the punishment. As it is congruent with the specific intent it affects the offence or the punishment as the specific intent and not as the motive.

(291) Definite and Indefinite Intents

If a person intends to do a definite wrong to a definite person or persons, his intent will be definite.[1] The act intended by him would be treated as definite even if the pattern thereof entails limited results, e.g.; someone butchers a person or several persons with a knife or throws a bomb conscious of the fact that it will kill several people — an act with indefinite possibilities. In this latter case the offender cannot possibly determine the results of his act as he can in butchering the victim with a knife.

If the offender is conscious of the potentional results of his act and does intend to produce all or some of those results his offence would in spite of its indefinite results, be treated as a definite act, whatever the results produced by it.

The victim will also be treated as definite if he is amenable to determination in any respect. If his name, personality or quality cannot be identified, but can nevertheless be determined somehow or other, he will be regarded as definite. For instance, a killer intends to murder one of the members of a particular organization to achieve his end and shoots at all the members thereof who are known to him and one of them is killed. In such a case then he will be deemed to have shot the definite person dead. Again, the offender will be regarded as having shot a definite person if he shoots any member of a definite organization whose members he does not know at all; for the organization in question is definite and the intended victim too is the organization as a whole. Hence

1. (a) *Al- Nihayat-ul-Muhtaj*, Vol.7, p. 235.
(b) *Al Bujarami, Al Sharhul Minhaj*. Vol. 4, p. 130.

the organization will be deemed definite victim both individually and collectivily.[1]

The intention of an offender to do a definite wrong to an indefinite person will be regarded as definite intent. If the identity of person intended to be wronged cannot be determined before the wrong is done, such a person would be deemed indefinite. For instance, the intention of an offender is not definite who lets loose a ferocious hound to hunt down a person or digs a well on the roadside so that any passerby may fall therein. But if he proposes to kill a definite person then his intent in relation to that person is definite. However, if he kills an indefinite person along with the definite victim, then his intent as to former is indefinite and as to the latter definite.[2]

In determining the accountability of the offender and the sort of offence he is guilty of, the jurists place both definite and indefinite intents on equal footing and regard them as subject to the same injunction except when the offence consists of homicide and the criminal intent is indefinite. In cases of homicide or indefinite intent, however, the jurists are in disagreement as regards the determination of the offender's accountability and the pattern of offence. Some jurists of the Shafi'ee School hold that if the offender intends to kill an indefinite person he will be accountable as guilty of quasi-wilful murder and not a wilful one, so long as his object is to kill an indefinite person.[3] The Malikite jurists, on the other hand, draw a line of distinction between the direct commission of homicide and casual complicity therein and regard both the definite and indefinite intents as subject to the same provision in direct complicity and in either case deem the killer guilty of wilful murder. In the case of causal complicity, however; if the offender intends to kill a definite person and his intent is translated into action, he will be held responsible for wilful murder: but if he intends to kill an indefinite person, he will be guilty of murder by mistake.[4]

1. *Tuhfat-ul-Muhtaj,* Vol.4, p.2 and 3.
2. *Tuhfat-ul-Muhtaj.* Vol.4, p.2 and 3.
3. *Tuhfat-ul-Muhtaj,* Vol.4, p.2 and 3.
4. (a) *Mawahib-ul-Jaleel,* Vol.6, p. 240.
   (b) *Sharh-ul-Kabeer lil-durdeer,* Vol.4, p. 216.
   (c) *Sharh-ul-Khareshi,* Vol.8, p.8.

Explanation of the position taken by the jurists of the Shafi'ee school is that wilful murder presupposes the death of the victim and such a pre-requisite cannot be fulfilled unless the killer intends an act causing the intended murder of a definite person; for if the killer intends to kill an indefinite person, then the intention would doubtless be present but it would not involve the will to take the victim's life whom he does not know at all. It may even be possible that the victim later turns out to be a person dearest to the heart of the killer. Moreover, the offender is involved in the homicide as one who intends to take the life of the victim; whereas in the case of an indefinite intent it is difficult to say that the killer wants to murder the very person whose life is taken by him. Now if the victim is absent, what remains is the will to do the act causing death and such an act under the Shariah would be treated as quasi-wilful murder.[1]

The position of the *Malikites* may also be accounted for identically. Moreover, the reason for the difference between the direct commitment of an offence and causal complicity therein is that for the direct accomplice is that the victim is often a definite person; for he commits homicide directly and as a rule an offence is committed only when the victim is within the reach of the killer and this is a position in which the victim becomes a definite person for the killer. In causal complicity on the contrary the case is different. In such a situation the offender commits murder indirectly and often commits it without getting hold of the victim and without determining his identity.

The Hanafites and the Hamblites as well as some jurists of the Shafi'ee school do not differentiate between definite and indefinite intents in criminal cases including homicide. Hence if the act of the offender results in homicide he is a wilful killer whether or not his intention of murder involves a definite victim.[2]

1. One may arrive at the same conclusion by supposing the act in question as wilful homicide. It may be said that the actuality of the criminal intention is doubtful. We know that *hud* is annulled by doubt. When punishment of *qisas* is annulled, the act is liable to the punishment laid down to quasi-wilful murder notwithstanding the fact that the act constitutes wilful homicide.
2. (a) *Bada'e-wal-Sana'e*, Vol.7, p. 233.
   (b) *Al Muhazzab*, Vol.2, p.184.
   (c) *Asna-ul-Mutalib* Vol.4, p.3.
   (d) *Al Mughni*, Vol.9, p.320 and the following pages.
   (e) *Al-Iqna,* Vol.4, p.163.

It may be mentioned here that the Shariat qualification of definite and indefinite is identical with that of determined and undetermined in the modern laws. Similarly the position of the jurists who do not distinguish between definite and indefinite intents is the same as the one taken by the scholars of the French and Egyptian laws. Both those laws do not draw any line of distinction between the determined and the undetermined; for in either case the offender intends or accepts the outcome of his act.

In the provisions of the laws mentioned, no distinction has been made between the determined and the undetermined criminal intents. They are rather in consonance with the view of those jurists of Islam who do not discriminate between the definite and indefinite criminal intents. Thus in article 231 of the Egyptian criminal law which bears close analogy to the article No.297 of the French Criminal law pre-planning crime has been described in the following words.

It is the "resolve beforehand to commit an offence designed by the intending offender to torture a definite or indefinite person, whoever he finds or meets regardless of the fact that such a criminal intent is conditional or dependent on the occurrence of some event."

(292) Direct and Indirect Intents

If an offender commits an offence conscious of its results and meaning to produce those results, his intention will be direct intent, whether or not it is a definite intent and the intended victim is a definite person.

On the other hand if an offender intends to commit a definite act which, when committed, produces such effect as he may never have intended nor does he exercise any control over the emergence of such effects, his intention will be treated as indirect intent. This is also known as probable intent.

The jurists of Islam have not discussed direct and indirect intent; nor have they touched on the question of probable intent. But this does not mean that the Shariah is a stranger to the concept of probable intent and does not discriminate between direct and indirect intents. The truth of the matter is that it is

familiar with the concept of probable intent and that it does draw a line of distinction between the direct and indirect intents. Cases of wounds and injuries provide a proof of this.

The man who strikes blow or inflicts a wound means to chastise or discipline the victim by causing him a minor wound or injury or the purpose of his act is to torture him. In such a case the offender is not only accountable for the intended and expected results of his act but is also held responsible for the consequences which he cannot foresee. For instance, if the wound or injury caused by him results in the dismemberment or disability of limb of the victim, the offender will be accountable and liable to punishment for such consequences as well. If the blow or wound inflicted by him proves fatal, he will be held responsible not only for the wound or injury so caused by him but also for the death of the victim as a case of wilful homicide. In short the Shariah regards the offender as accountable for those results of the wounds and injuries inflicted by him which he neither intends nor expects. Holding him responsible for the commission of an unexpected offence means that the offender is liable to prosecution for his indirect or probable intent.

In the light of what has been stated above it is clear that the Shariah is familiar with the concept of indirect intent. The question, therefore, is of little substance what the jurists say in this regard and what conclusions they have drawn from the provisions of the Shariah or whether they have simply contented themselves with the application of those provisions. In any case this question is of secondary importance. It concerns their respective approach and style of expression.

A study of the observations made by the jurists as to the offences of homicide and infliction of wounds or injuries would familiarize us with their opinions as regards probable intents and the relevant injunction of the Shariah. These are their views offered by the jurists on this problem:

(293) First View

The first view is the one advocated by Imam Malik. He draws a line of distinction between intentional and unintentional offences in the case of homicide and infliction of wounds or

injuries and in either case holds the offender responsible for the outcome of his act. If his act results in the death of the victim, he will be accountable for homicide, but if it results in the dismemberment or disability of any of the victim's limb he will be called to account for such a grievous injury. However, if the wound resulting from the below struck by the offender heals up without causing any permanent mark or defect on the person of the victim, or his blow does not harm the offender will be held responsible for it in proportion to the outcome of his offence. The difference between intentional and unintentional offences does not lie in his criminal act intrinsically. It owes itself to the intent of the offender at the time of the commission of the offence. If he means to violate the law-makers command at the time of committing the offence, his act will be treated as intentional but it will be regarded as unintentional if he means no transgression at the time of committing the offence. Imam Malik is of the view that in the case of wilful homicide and infliction of a blow or wound the common intent is sufficient to render the offender accountable. In the case of wilful homicide the Imam does not lay down the condition that the killer should necessarily have intended to take the life of the victim[1] nor does he lay down the condition that the offender should have intended the outcome of his act which results in the dismemberment of the victim's limb or disability thereof. Thus if a person slaps or boxes another person with the intention of transgression and his act of transgression results in the death of the victim, he will in the view of Imam Malik, be treated as a killer. Similarly if a man throws pebble at another man, beats him with a stick or gives him light blow with a club but does not strike him successively, causing nevertheless, the death of the victim he too will be treated as wilful murderer. In the same way Imam Malik looks upon an offender as wilfully guilty of murder, who causes the death of the victim by pushing him or seizing his leg, making him fall down thereby. In all these cases there is no condition of either the use of homicidal

1. According to the French law common intent was regarded as sufficient ground for the accountability of the offender till 1832 when the law of Special punishment was promulgated for a blow causing death.

weapon or involvement of the intention of taking the life of the victim on the part of the killer.[1]

If someone slaps a person with the intention of transgression and consequently pulls out the victim's eye or deprives him of eyesight, he will be accountable for the outcome of his act whether or not he intended and expected it. As Imam Malik holds the person who strikes or injures the victim responsible for all the results of his action because of his intention to commit a wrongful act; the offender is not accountable only for his definite intent in its limited sphere but has to account for all the probable results of his acts on account of his intention to do a wrongful act. This accords with the new notion of accountability on grounds of probable intent.

To sum up the position of Imam Malik, the offender is accountable for all the consequences of his intentional act whether he may have intended and expected those results or not and whether such consequences comprise usual developments or rare events that seldom occur. The view advocated by Imam Malik is logical because he does not accept the concept of quasi-wilful homicide. He recognizes only two kinds of homicide. (a) wilful murder and (b) murder committed by mistake. The position taken by the Imam does not admit of any third kind and, therefore, there was no need for him to have laid down the condition of specific intent in order to distinguish wilful murder from quasi-wilful homicide.

(294) Second View

The exponents of the second view is the Hanafite school. A minority of the Hambilites also subscribe to the same view.

The advocates of this view discriminate between intentional and unintentional offences in the case of causing wounds and injuries. The basis of difference in intentional and unintentional offences is the criminal intent of the offender. If he commits the offence with the intention of transgression, he is a wilful offender, but if his act does not involves the intention of transgression, he cannot be treated as a wilful offender.

1. (a) *Al Madawwa,* Vol.16, p.18.
(b) *Al Mawahib-ul-Jaleel,* Vol.6, p. 24.

The jurists in question draw a line of distinction between homicidal intent and the intent of all those offences which result in death or a grievous injury lesser than death, and lay down the condition for wilful murder to the effect that the offender should not only mean to commit capital crime but should also intend to take the life of the victim. If both the criminal intents are involved in the offence, the offender is a wilful murderer. But if the first intent is involved and the second is absent then the offence will be treated as quasi-wilful murder.

In the case of offences other than wilful homicide, the only condition is the presence of common intent or the intention to transgress, i.e. the offender should intend to do an act knowing that it is unlawful. In the case of an offence involving this intent the offender will be accountable for all the consequences of his act, whether he intends and anticipates those consequences or not and whether such consequences comprise ordinary developments or extraordinary ones. Thus if someone strikes a person intentionally and his act proves fatal, he will be held responsible for quasi-wilful murder. But if he slaps the person with the result that his eye is pulled out or he is deprived of vision, he is not only accountable for his criminal intent but also results of the act ensuing from such an intent.[1]

The advocates of the view are both in agreement with and opposed to the position of Imam Malik. So far as crimes other than homicide are concerned, they are in complete agreement with the Imam and regard the offender as accountable on grounds of probable intent involved in his act. But in the case of wilful homicide they are at variance with Imam Malik. They do not hold the offender.

The jurists referred to distinguish two offences. According to their interpretation there are offences resulting in death and those resulting in grievous injury lesser than death. The former consists of every criminal act causing death, whether it is committed intentionally or unintentionally. A criminal act lesser than a capital

1. (a) *Al Bahr-ul-Raiq* Vol. p. 287.
   (b) *Badae'-wal-Sanae'*, Vol. 7, p.233.
   (c) *Al Mughni.* Vol.9, p. 410.
   (d) *Al Sharh-ul-Kabeer,* Vol.9, p. 428.

crime consists of physical injury which is not fatal, This interpretation, no doubt, is comprehensive and includes all the possible forms of excess and torture. It applies to all the cases of wounding, striking pushing, dragging, squeezing, pressing hair, cutting and hair-plucking. Obviously the provision of Egyptian law regarding infliction of injury and beating is inadequate and does not cover other forms of excess and torture responsible on account of probable intent in cases of homicide. According to them wilful homicide is qualified by the intention of the offender to take the life of the victim. Imam Malik, on the other hand, holds that the offender is accountable for not only murder and wilful homicide on account of probable intent but also for other offences. The reason for this difference of opinion between Imam Malik and the other jurists is that the latter divide homicide into three categories: wilful and quasi-wilful murder and murder committed by mistake. In accordance with this qualification they have distinctly delimited each category and have in the case of wilful murder laid down the condition that it must involve the intention of the offender to take the life of the victim so that wilful murder may be distinguished from quasi-wilful homicide. In the case of the former only the offender's intention of homicidal act is sufficient. Therefore; if he intends to commit the homicidal act and also means to take the life of the victim he is wilfully guilty but if he simply intends to commit the homicidal act (without meaning to take the life of the victim) he will be quasi-wilfully guilty. Imam Malik, on the contrary, is of the view that he is to be treated as a deliberate killer in either case.

(295) Third View

The third view is advocated by Imam Shafi'ee and a majority of the Hamblites. These jurists hold that there is a difference between intentional and unintentional offences but in either case the offender is accountable for all the consequences of his action. If he commits the offence with the intention of transgression he is a deliberate offender and if he does not commit it with the intention of transgression, he is not a deliberate offender.

On this view there is a difference also between wilful and unwilful homicidal acts. If the killer intends to commit the homicidal

act as well as to take the life of the victim, he will be accountable for wilful homicide; but if he intends to commit the homicidal act but does not mean to take the life of the victim, he will be treated as guilty of quasi-wilful murder notwithstanding the fact that he does intend to do an act which generally results in death. There is no room for probable intent in wilful homicide. The advocates of the third view agree with those of the preceding view in this regard.

According to the jurists holding the view under discussion the offender is accountable as wilfully guilty for all the consequences in the case of offences which are lesser than capital crime as well as for those he may have intended or caused by his offence whether or not may have intended and expected such consequences. Ensuing of such consequences from his offence in this way places them under the injunction relating to the results desired by the offender. But, on the contrary, if the consequences ensuing from his act comprise such events as are neither desired by him nor generally occur as a result of the kind of act he may have committed he will not be held responsible as wilfully guilty.

The reason for this is that such consequences are neither involved in his criminal intent, nor do they generally ensure from the sort of criminal act committed by him. The offender is not accountable for the consequences following his act as an errant either, since he merely means to commit the offence and does not desire the consequences thereof. However, he is definitely accountable for such consequences as one guilty of quasi-wilful offence. Quasi-wilful offence occupies a position between wilful offence and mistake and the degree of accountability it entails is lesser than wilful offence but greater than error; for it consists in a blend of error and wilful offence. In the case of such an act, the offender does not intend its consequences or the consequences ensuing therefrom are such as do not generally manifest themselves in a case like this and therefore, he errs in regard to them although he deliberately commits the offence. On this ground it is necessary that the penalty of a quasi-wilful offence should be lighter than a wilful offence but harsher than an error. Let us suppose by way of illustration that the offender slaps a person and this act of violence results in the displacement of the victim's eye or in the

loss of vision, but the offender never means to cause such a serious injury. He is therefore accountable because of his offence and not because of the result thereof. His accountability owes itself to his intention to resort to violence but not to the harm resulting therefrom; nor does such a harm generally manifests itself in consequence of a slap. Similarly he is not accountable as an errant either, because he is intentionally guilty of the offence. He is actually accountable as quasi-wilfully guilty and thus will incur a penalty lighter than one wilfully guilty but more severe than an errant. Let us suppose again that the offender passes his finger into the socket of the victim's eye and pulls out his eye-ball depriving him thus of eyesight, he will be accountable for such a consequence of his offence as deliberately guilty because he does not only mean to commit the offence but desires the result thereof which generally ensues as expected by him. Let us consider yet another example. The offender hurls a stone at the victim which splits his head. In such a case he will be held responsible for his act as wilfully guilty inasmuch as he does not only intend to commit the offence but also the harm ensuing from his act is the common result of such an act. Let us consider one more example. A person throws a small pebble at another person's forehead which bruises his forehead and causes inflammation on it. The offender in this case will not be accountable for the consequences of his act as wilfully guilty because such a consequence does not generally ensue from the act committed by him. He will rather be held responsible as quasi-wilfully guilty.

(296) The Three Views Compared

According to Imam Abu Hanifa, Shafi'ee and Ahmed wilful offence does not involve probable intent, whereas Imam Malik recognizes the presence of probable intent in it and holds the offender responsible on account of such intent in every case.

The basis of this difference is that Imam Malik divides homicide only into two categories of wilful murder and murder committed by mistake. With him any capital crime not committed by mistake is wilful homicide. Only the will to transgress in the homicidal intent is sufficient to hold the offender responsible and this very element of the will to transgress distinguishes wilful

act as well as to take the life of the victim, he will be accountable for wilful homicide; but if he intends to commit the homicidal act but does not mean to take the life of the victim, he will be treated as guilty of quasi-wilful murder notwithstanding the fact that he does intend to do an act which generally results in death. There is no room for probable intent in wilful homicide. The advocates of the third view agree with those of the preceding view in this regard.

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murder from one committed by mistake. The other Imams on the other hand, classify homicide into three kinds; wilful murder, quasi-wilful murder and murder committed by mistake. They qualify wilful murder with the offender's intention to take the life of the victim in addition to his will to commit the homicidal act. If the offender intends to commit the offence but has no intention to kill the victim, he will be guilty of quasi-wilful homicide and not intentional murder. Thus he will be liable to a punishment lighter than the one entailed by wilful murder but more severe than homicide committed by mistake. Thus the condition of the will to take the life of the victim excludes probable intent from wilful homicide.

All the jurists recognize the presence of probable intent in the offences of lesser than killing; for instance causing injury by beating etc. Imam Malik and Imam Abu Hanifa agree that if the offender is intentionally guilty of a crime he may in all cases be taken to account because of probable intent. Some of the Hamblites also subscribe to this position.

But Imam Shafi'ee endorses the view held by a majority of the Hamblites to the effect that the offender is accountable only for those consequences which he may have intended; that he is to be taken to account because of probable intent as one wilfully guilty and that the consequences of the offence committed by him will be treated as subject to the provision relating to the intended consequences. Such consequences are deemed to be the results that generally ensue from a given offence. However, if the consequences are neither intended nor consist of such results as generally manifest themselves in the wake of a given offence are unintended consequences or are results subject to the provision pertaining to unintended consequences. But the offender will not be held responsible in respect of such consequences as an errant because he does mean to commit the offence giving rise to those consequences. He will rather be held responsible as one quasi-wilfully guilty and will thus be liable to a penalty ranging between punishments entailed by wilful offence and criminal error.

(297) The Shariah and Man-made Law Compared

Offences of homicide and infliction of wound and injury

are the primary basis of probable intent. It is from these offences that the idea of probable intent has stemmed and a specific concept has been formulated.

Most of the man-made laws in force do not lay down any general principles with regard to probable intent. They rather contain a subsection in respect thereof as a part of the offences constituting infliction of injury and blow as well as those resulting in wound or injury. For instance the Egyptian penal law (articles 240-243) provides for the accountability of the offender in cases of beating or causing injury on account of probable intent. Besides in the case of certain other offences also it declares the offender responsible because of probable intent. Those offences are torturing the accused to force him to make confession (article 126); disruption of means of communication or putting them in jeopardy with the intention of injuring or killing someone (articles 167-168); setting a place on fire intentionally, causing thereby the death of the person present there; any offence endangering the safety of children in a manner that one of them loses his limb or any limb of the child is disabled or the child is killed.

The Egyptian law does not provide for any general principles regarding probable intent but contains a subsection pertaining thereto in its article No.23, which provides punishment of accomplices in an offence. According to this subsection if anyone who is found guilty of complicity in an offence is liable to punishment even though the offence is not the one he may have originally intended but is the result of his incitation collusion or abetment.

The concept of probable intent has been introduced in the man-made laws very late. Although it has now been technically accepted in these laws, yet in practice the laws in question and their scholars are not in complete agreement. The laws differ in the operational range of the concept of probable intent while the scholars interpret it differently.

At any rate the conclusions arrived at by the modern legislators and the legal experts so far do not on the whole transcend the three views of the jurists of Islam discussed above.

The Egyptian law has adopted the view advocated by Imam Abu Hanifa with regard to the offences of murder, beating and

causing injury, although it does not explicitly attach the string of the intention to take the life of the victim to the offence of wilful homicide. The condition of intent to take the life of the victim, calls for discrimination between wilful homicide and the blow resulting in the death of the victim and excludes probable intent from the purview of wilful homicide. But the Egyptian law, on the other hand, holds the offender inflicting wound or blow responsible for all the consequences of his act whether he intends and expects them or not and whether such consequences constitute the results that normally ensue from the act or not.

The French law also acts on the view of Imam Abu Hanifa in respect of capital crime and the offence of subjecting the victim to physical violence such as infliction of injury or a blow. Thus if the offender beats the victim with a stick causing him grievous injury resulting in his death, the offender will be accountable for the fatal blow. If his blow causes some physical trouble the offender will be held responsible for the trouble caused by it. If the victim is disabled by the blow for a period of twenty days or less, he will be accountable for the victims disability for that period. In short the offender will be accountable in all such cases as one wilfully guilty and not as an errant.

All these matters have been acknowledged by both the Egyptian and the French laws because of the presence of relevant provision. But they do not make the offender liable to prosecution for probable intent in the case of wilful murder on the ground that by calling the offender to account for probable intent homicide will come to be confounded with the blow causing death and it will be consequently difficult to distinguish the one from the other. Besides the scholars of the French and Egyptian laws base their concept on some other considerations and declare the offender accountable on account of his probable intent provided that the results of his criminal act constituting the immediate consequences thereof are likely to ensue and are amenable to anticipation in all probability whether or not the offender does actually expect such consequences. Some of the scholars think that the offender should be called to account as deliberately guilty in two cases which are as follows:

(1) When a relevant legal provision exists;

(2) When the apparent results of his offence are inevitable leaving no room for the misconception that the offender may have intended the offence but not the consequences.

Apart from these two cases the offender is to be called to account as an errant.[1]

From what has been stated above it may be seen that the French and Egyptian laws have adopted the view advocated by Imam Abu Hanifa in the case of homicide and the criminal act of inflicting blow and injury. They are in consonance with the view of Imam Malik only in so far as it relates to the offences of inflicting injury and blow and subscribe to the view propounded by Imam Shafi'ee only to the extent of homicide only.

The standpoint of the Egyptian and French laws is closer to the view advocated by Imam Shafi'ee and a majority of the Hamblites. But the view held by the jurists of Islam is far more rational and logical, since according to this view intended results are taken for granted on the basis of those which generally manifest themselves consequent on a definite criminal act and thus the offender is treated as subject to the provision pertaining to one wilfully guilty. Similarly a separate injunction has been provided for the results occasionally ensuing from an offence and in such a case the offender is treated as one quasi-wilfully guilty. This logic is more comprehensive and plain, involving no complications or obscurity. For in the case of unintended consequences the right criterion of the offender's accountability is to consider whether or not such unintended consequences normally manifest themselves or are to be seen occasionally. If they generally manifest themselves then the offender must be mindful of them and must be conscious of their inevitable relationship with the original offence he intends to commit. Hence if he intends, to commit the offences he necessarily intends those consequences as well. In short this is an invariable criterion resting on concrete grounds. This ground comprises the emergence of normal consequences. The criterion in question does not rest on relative basis which varies with individuals and with the difference off their modes of thinking and their varying capacities to comprehend the consequences. On

1. (a) Kamil Mersy, Saeed Mustafa, Sharh *Qanoon-ul-Uqoobat* p. 375.
(b) *Majalla-tal-Qanoon-wal-Iqtisad-ul-Sanat ul-oola*, p.877.

the contrary the position taken by the scholars of modern laws is not invariable in the like manner and the criteria of their presumption of accountability are not as comprehensive. They treat the offender as accountable for the immediate probable and the prospective consequences. Here the test of immediate consequences is neither correct nor invariable for the limits of immediacy have not been determined. Similarly the probability of the resultants is not tenable and unchangeable either. So also is it true of the probability of the expectation of the resultants; for the probable consequences may be both immediate and remote. It is also possible that one individual expects those consequences and another individual does not. Similarly it is possible that the consequences which an individual views as probable are not considered probable by another individuals.

According to the British law wilful homicide does not necessarily involve the intention of the killer. Anyone is regarded as wilfully guilty of homicide whose offence results in the death of the victim provided that the offender is conscious of the fact that his act may cause death, whether or not he means to kill the victim. The position of the Sudanese law is similar. It provides that in case if the purpose of the offence is to cause death or the offender is aware or has the means to know that the probable consequence of his offence is death or if he commits the offence for the purpose of causing bodily injury to the victim, then his homicidal act would be deemed wilful murder.

In short the laws of Britain and Sudan require the offender to be called to account for wilful murder because of his probable intent. The German law also takes similar position by declaring the offender wilfully guilty on the basis of probable intent in cases of wilful homicide etc. provided that the offender is mindful of the results or expects the results actually ensuing from his criminal act although he may not have intended such results to ensue.

The German, British and the Sudanese laws are in consonance with the view advocated by Imam Malik in declaring the offender accountable because of his probable intent in cases of wilful homicide. But the scope of the Imam's view is much wider and

more comprehensive than all the three laws. According to these laws the offender can not be called to account on the ground of probable intent unless he expects that his act is likely to result in the death of the victim; whereas with Imam Malik he is accountable even if he has no intention to commit murder, nor does he expect that murder would result from his act. For instance, a person slaps another person with the intention of transgression without meaning to kill him or having the least idea that his slap would end the life of the victim. Such a person would he deemed accountable by Imam Malik wilfully guilty of murder whereas under the German, British and Sudanese laws his act would not be treated as wilful homicide.

It may be noted that the standards laid down in the three laws mentioned above are variable. For instance, according to the position of the German law the offender is accountable if he has the idea of the consequences of his offence or expects the consequence. Now ideation is a subjective process and it cannot be proved unless the offender confesses it. Moreover, what one person has in mind may not be in harmony with what another person has. That is why no hard and fast rule can be laid down for ideation and expectation. Under the British and Sudanese laws it is essential that the offender is aware of the fact that his criminal act may result in the death of the victim. Knowing too, is a subjective affair and cannot be ascertained unless the offender himself admits it. Moreover what one person knows or can know another person does not know or cannot know. For this reason no rule can be laid down for 'ability to know'.

In modern legislation attempts have been made to make many general provisions for probable intent. But these provisions, though multifarious do not transcend the views expounded by the jurists of Islam. For instance, the Mexican law of 1931 declares the offender accountable as one wilfully guilty for all the unintended consequences of the offence provided that they are the inevitable and natural results of the criminal act or are expected by the offender or that the offender is determined to violate the law by ignoring those consequences. The Mexican legislators have derived all these ideas from the Islamic law. Similarly, the Italian law of

1930 declares the offender accountable for the consequences which he may not have intended and provides for a punishment for such unintended consequences lighter than that to which a deliberate offender is liable but more severe than deserved by an errant. This principle of Italian law rests on exactly the same basis on which the view advocated by Imam Shafi'ee and a majority of the Hambilites does.

From the respective positions of the jurists of Islam and modern laws with regard to probable intent, it is crystal clear that these laws contain nothing new which was not already there in the Islamic Shariah. In fact the scholars of modern laws have yet to grasp those problems to which the jurists of Islam had access hundreds of years ago. For instance, the modern laws have not been able to go beyond the confines of the Shariah in respect of probable intent which requires the offender to be called to account for killing and for offences other than killing on account of such intent. We cannot therefore, resist the temptation to conclude that the views advocated by the jurists of Islam are much wider, more rational and more suitable than the position of the modern law.

D. Bearing of Ignorance Mistake and Forgetting on Accountability

(298) Effects of Ignorance on Accountability

One of the principles of Islamic Shariah is that the offender is accountable for the commission of a forbidden act when he knows fully well that the act is unlawful. If he is not aware of the unlawfulness thereof his accountability will not be valid.

Possibility of knowledge is sufficient for the knowledge of prohibition. If a man is sensible and can easily find out whether an act is prohibited or not; for instance, if he studies the prohibitory provisions of the Shariah or enquires about it from the scholars of religion then such a person will be deemed aware of forbidden acts and his plea of ignorance will not be admissible. The jurists verdict is clear on this point.

"Excuse of ignorance of Islamic injunctions is not acceptable in Darul Islam."

Hence every obligated person will be treated as having the knowledge of the Islamic injunctions on the basis of the possibility of knowing and the presence of knowledge is not necessary. For this reason a prohibitory provision will be treated as if everyone knows it provided that the possibility of acquiring its knowledge exists although most people may not actually be aware of it or may not be having a full knowledge thereof provided that it is possible for all of them to acquire the knowledge of that prohibitory provision. In short the Shariah does impose the condition of the knowledge thereof in practice. The reason for this is that such a condition would give rise to a very difficult situation. All the people when called to account would come out with the excuse that they were ignorant of the unlawfulness of the act committed by them and thus all the provisions of law would be suspended.

The above principle of the Shariah is universal and admits of no exception. The jurists, however accept the excuse of a person who does not associate with the Muslims and lives in seclusion in a jungle or a Muslim convert who does not live in the Muslim society. But this is no exception to the rule. It is in fact the application of another aspect of the same principle which enjoins that no person can be called to account unless he can easily learn the unlawfulness of an act. In the case of a person living in seclusion or a Muslim convert who does not live in the Muslim society who cannot easily find out if an act is unlawful. Such person will, therefore, not be regarded as aware of the Islamic injunction. But if the person who claims to be ignorant of these injunctions has been brought up in a Muslim milieu or possesses the knowledge of Shariah provisions then he cannot be excused on the plea of ignorance.

Ignorance of the real meaning of provisions is linked with the ignorance of the provisions themselves and the same injunction is applicable to both. For instance, if the offender claims that the relevant provision does not prohibit the commission of an act or that another provision warrants the act, his accountability will not be invalid because of his ignorance of the real meaning of the provision. This is known in modern legal terminology as

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misconstruction of the law. An example of such misconstruction is provided by the wellknown case of a group of Syrian Muslims who drank wine on the plea that it is not unlawful and cited the following verse of the Holy Quran to justify their act, but they were punished all the same:

> "There shall be no sin (Imputed) unto those who believe and do good works for what they may eat." (5:93)

All the man-made laws in force are in complete harmony with Shariah in respect of the effect of ignorance on accountability. They all contain the principle that ignorance of law is no excuse. Ignorance of law includes the incorrect knowledge of law resulting from the misapprehension, and misconstruction thereof. However, if a man happens to be in an environment wherein he cannot know of the promulgation of any law, his plea of ignorance may be admissible. Let us suppose by way of illustration some people are besieged by the enemy in a fort. When the siege is lifted they come out and violate the laws promulgated during the siege. In such a case they will not be accountable for the infringement of the laws on question as it was not possible for them to know of promulgation thereof.

(299) Effects of Mistake on Criminal Accountability

Mistake means occurrence of an event without being intended by the agent. Criminal errors are not committed by the agent wilfully. They are rather committed by him unintentionally or even against his will. In many cases it so happens that the offender proposes to do a definite act which is not an offence in itself, but this legitimate act gives rise to an act which is regarded as a crime stemming from a lawful deed intended by the agent. For instance, one who is fasting tries to rinse his mouth with water which gets into his throat (and thus his fast is broken). Again, suppose that a person shoots an arrow aiming at a bird but it hits a man. In the first case mentioned above, the person fasting means to rinse his mouth by water, but does not intend to break his fast. Thus his intention is to do a lawful act but his act results in something unlawful. The hunter in the second example aims an arrow at a bird without meaning in the least to shoot the man. Thus he intends to do a lawful act but unwittingly commits

something unlawful. His arrow hits the victim instead of the bird which is the real target he aims at.

An errant is accountable for a penal crime in the same way as a deliberate offender. He will be held responsible for every illegal act but there is a difference between the accountability of a deliberated offender and that of an errant. The grounds of the latter's accountability is his intentional violation of the law-makers edict and the wilful commission of an act forbidden or omission of an act enjoined by him. The accountability of the errant owes itself to the unintentional violation of the law-makers edict by negligence, error or inadvertence.[1]

(300) Accountability for Mistake is Exceptional

The principle prescribed by the Shariah is that criminal accountability is entailed only by intentional violation of the law or commission of act forbidden by the law-maker and by one committed by mistake. Says Allah:

> "And there is no sin for you in the mistakes ye make unintentionally but your hearts purpose (that will be a sin for you." (33:5)

And the Holy Prophet holds out the assurance:

> "The people of my Ummah are exculpated from acts done by them by mistake or obliviously or under duress." But the Islamic Shariah allows punishment for mistake by admitting of exception to the rule under discussion.[2]
>
> "It does not behave a believer to kill a believer unless it be by mistake. He who hath killed a believer by mistake must set free a believing slave and pay the blood-money to the heirs of the slain." (4:92)

Thus a wilful act as a rule entails punishment and a mistake entails exemptory punishment. It may be inferred from this rule that the agent is liable to punishment for every offence he commits intentionally but if he commits an offence by mistake he is not liable to punishment, save such a criminal error is one for which the law-giver has laid down punishment; for in a case like this

1. *Usool-ul-Fiqah, Al Khudhri, p.* 31.
2. *Ibn-e-Hazm, Al Ahkam fil Usool-ul-Ahkam* Vol. 5., p. 149 and p.154.

the offence falls under the category of both intentional offences and criminal mistakes. Hence if anyone intentionally commits adultery, he will be liable to punishment prescribed for adultery. But if he enters into sexual intercourse with a woman by mistake who is sent to him on the wedding night he will not be liable to any punishment because he does it inadvertently; whereas an offence is an offence only when it is committed wilfully. Similarly if a person intentionally commits larceny, he will be amenable to the punishment laid down for such an offence. But if someone mixes up the belongings of another person with his own by mistake or obliviously or takes them away by mistake he deserves no punishment inasmuch as he does not commit the unlawful act intentionally. Again, one who drinks wine will be punished for drinking it, but one who drinks wine mistaking it for water, will not be liable to any punishment as he does not drink it intentionally. In short, the offender deserves punishment for knowingly committing any of the wilful offences. But if he does any such criminal act by mistake, he will not be liable to any punishment. The reason that may be given for the offender's exculpation is that in the commitment of an unlawful act by mistake one of the ingredients of the wilful offence is absent and owing to the absence thereof the offence does not take place.

But nullification of accountability by the absence of any component of a wilful offence does not stand in the way of civil accountability of the offender. For according to the principle of the Shariah the life and property of a person is not blameworthy and as such they cannot be deprived of security of grounds of anything contained otherwise in the Shariah. Thus the man who enters into sexual intercourse with a woman sent to him inadvertently on the wedding night, mistaking her to be his bride, will not be accountable under the penal law; but he will be under the obligation to pay her dowery; for an act of sexual intercourse in Darul Islam is stipulated by the payment of dowry; otherwise it would be punishable by *hud*. Similarly the person who stealthily takes anything belonging to someone else, mistaking it to be his own and makes use of it, will have to pay penalty for the use of the thing, although he will not be criminally accountable for not being deliberately guilty.

But in case if the offence is one which constitutes an unlawful act when committed both deliberately and inadvertently, such as homicide or infliction of injury, then the deliberate offender will be liable to punishment laid down for intentional offence and the delinquent (guilty of error) to one laid down for mistakes. We have already mentioned that the law-maker draws a line of distinction between the punishment of one deliberately guilty of an offence and one inadvertently guilty. It enjoins severe punishment for the deliberate offender and lesser punishment for one guilty by mistake.[1]

Public interest demands that punishment should be awarded for mistakes also, since certain dangerous offenders like homicide and causing injury are common. Mistakes are generally committed because of negligence and carelessness and therefore, the law-maker has taken care to provide for punishment for mistakes in the case of dangerous and common offences as well. It is in the public interest to award punishment for such offences so that the people may be cautious and careful and incidence of crimes committed by mistake may be reduced.

The Islamic law contains provision for certain definite offences. Most of these offences are treated as wilful while a few others as those committed by mistake. Now as punishment for wilful offences is essential and for those committed by mistake is exceptional the ruler is not competent to award punishment to the errant unless it is in the public interest to do so. This principle applies only to such acts as are declared unlawful by the Shariah itself. As for the acts prohibited by the ruler as crimes, the ruler is empowered to award punishment for the deliberate as well as indeliberate commission of offences keeping in view the relevant *Shariat* rules, provided that he does not lose sight of the principle of punishment; for wilful commission of an offence it is essential while for mistakes punishment is exceptional and that commitment of a criminal mistake does not incur any punishment unless it is prejudicial to public interest.[2]

1. See Article 285.
2. The Motazallites do not consider punishment for mistake warrantable, unless otherwise provided for in the Shariah. They argue that a person is accountable for the commission of a crime which presupposes the intention of the offender to commit it. As mistake does

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(301) Kinds of Mistakes

According to 'the Shariah there are two kinds of mistakes: (a) generated and (b) non-generated.

(a) Generated mistake is that which stems from a legitimate act or from an act which the agent may have considered legitimate. An indirect act may also constitute a generated mistake. For instance, a person aims an arrow at a bird but it hits a human being or if a soldier shoots an arrow at a man among the enemy troops wearing the enemy uniform believing him to be a soldier of the hostile forces, but later on it is revealed that the victim was his compatriot. A mistake may be committed as a causal factor too. For instance, someone digs a pit on the thoroughfare without obtaining permission of competent authority and without taking necessary precautions to save the passersby from falling into it.

Any mistake other than one generated is a non-generated mistake. Delinquent (a negligently guilty person) may be guilty of it directly. For instance, a person turning in his sleep crushes to death a child lying by. A non-generated mistake may also be committed indirectly or casually. In such a case the delinquent serves as a casual factor leading to the commission of a mistake. For example a person digs a well on the thoroughfare and a way farer falls into it. Or take another example: A person heaps stones on the thoroughfare and a wayfarer collides with it and dies.

Generated mistake committed directly is called by some jurists only mistake, while others give it the name of pure mistake. Non-generated mistakes directly committed as well as generated and non-generated mistakes causally committed are on the other hand, technically termed as errors subject to mistake injunction.[1] There are some jurists, however, who do not classify mistakes into different categories and call all the inadvertent acts mistakes.

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not involve any offence it is not crime; not does it entail any punishment. But most of the jurists are of the view that mistake involves negligence and carelessness, whereas carefulness and presence of mind is absolutely essential. Hence if anyone causes a mistake to be committed or is directly guilty thereof he commits an offence and can justifiably be called to account. See Fawateh-ul-Rhmoot by Abdul Ali Ansari, Vol. 1,p. 166.

1. Please see Article 285.

(302) Basis of Mistake

The basis of mistake in the Islamic Shariah is negligence and carelessness. But the accountability of a delinquent (one guilty of mistake) does not presuppose habitual negligence on his part. The only condition of his accountability in a generated mistake is negligence. In other cases, however, it is presumed that the delinquent is habitually negligent. He cannot therefore, escape accountability unless it is proved that he was forced to commit the mistake.

The jurists have two criteria of delinquency (i.e. to judge whether or not a person's guilty of mistake).[1]

(a) The first test of accountability in the case of mistake is that a prohibited act stems from a legitimate act of the delinquent or from an act which he considers legitimate. He will be criminally accountable for such an act whether he commits it directly or causes it to be committed provided that it is proved that it could have been avoided by him. If he could not have avoided it at all, then he is not blame worthy.

(b) The second test is commission of an unlawful act by the delinquent himself or the causation of such an act by him unless it is absolutely essential to do so. The act in question would be treated as uncalled for and the delinquent will have to account for it, whether or not he could have possibly avoided it.

(303) Mistake as Viewed by Imam Malik

According to Imam Malik mistake consists of act which the delinquent commits as disciplinary steps or for sport but which results in the death of the victim or in injury to his body. Imam Malik has taken this position because he does not acknowledge any offence as quasi-wilful. With him there are only two kinds of homicide wilful murder and murder committed by mistake. The former is committed with the intention of violating the law and the latter with no such intention. An act of homicide committed by mistake is that which is done by way of chastisement or during play. Since such an act does not involve any transgression, it is, according to the Imam, a mistake and not an offence.

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1. *Bada'e-wal-Sanae'*, Vol.7, p.271-272.

(304) Mistaken Person and Mistaken Identity

Mistaking a person means that the offender intends to kill a definite person but kills someone else instead. Mistaken identity means that the offender intends to kill a person mistaking him, say for Tom — the person he actually wanted to kill. But later it is revealed that the victim was Dick and not Tom. Mistaken person and mistaken identity constitute two categories of generated mistakes. Mistaking a person actually involves an act of criminal error; for instance, the delinquent shoots an arrow at the intended victim but it hits someone else. This is an act of mistake stemming from act intended by the delinquent. Mistaken identity, on the other hand, involves conjectural error of the agent originating from his intention; for example, the delinquent shoots an arrow aiming it at Tom but later it is found to have hit Dick. This is actually an error inherent in the intention of the delinquent. The mistake in such a case springs from his conjecture and intention.

The jurists differ on the question of mistaken person and mistaken identity. Some of them treat the delinquent as one wilfully guilty, while others hold him accountable as one erroneously guilty.

In treating the delinquent as a deliberate offender, most of the Malikites and some Hamblites take into account the difference between lawful and unlawful acts. If the intended act is unlawful in itself, conjectural error would not affect the offender's accountability. As he intends to commit an act which is intrinsically unlawful, he is a deliberate offender. For instance the person who wants to kill Tom but inadvertently kills Dick will be deemed deliberate killer of Tom. Similarly, if a person kills Dick taking him for Tom, he, too, will be regarded as the killer of the latter. But if the act intended by the offender is not unlawful in itself, the error involved in the act or in his conjecture will affect the accountability of the offender. As the offender in such a case actually intends to do a lawful act but errs in doing it or in his conjecture, he will be regarded as a delinquent inadvertently guilty and not as a deliberate offender. For example, a hunter who shoots an arrow aiming at a bird but kills a human-being, will be deemed guilty of homicidal error. Again, if a person shoots an arrow aiming at a *harbi* (one belonging to a non-Muslim State)

or at one whose life is regarded as exempt from compensation or retaliation, but the arrow goes wide of the mark and hits an innocent person he will be deemed guilty of homicide. Again, if a person kills Tom taking him for Dick, whose life is treated as exempt from *diyat* or retaliation, he too will be regarded as guilty of homicide.[1]

Jurists belonging to the *Hanafl* and *Shafi'ee* schools as well as some of the *Hamblites* hold that if an offender intends to kill a definite person errs in doing so and kills or injures someone else or commits a conjectural error and realizes afterwards that the victim was not the person he actually wanted to murder then the offender will be accountable for erroneous homicide or erroneous infliction of injury, for the victim is not the person whom he actually intended to kill or injure, and had he known that he was mistaken, he would never have committed the criminal act.[2]

Some *Malikites* draw a line of distinction between mistaking a person and mistaking a person's identity. They are of the view that in the case of a mistaken person, the delinquent will be accountable as inadvertently guilty, whether or not the act he intends to commit is in itself unlawful; whereas in the case of mistaken identity, he will be accountable as a deliberate offender, even if the act he intends to commit is in itself unlawful.

The jurists who treat the offender as deliberately guilty in the case of an act intrinsically unlawful are in agreement with the scholars of Egyptian Law and also with a majority of the French legal pundits. On the other hand opinion of the jurists who regard the offender as erroneously guilty in all cases is in harmony with the position of the German Law, while those who draw a line of distinction between the cases of mistaken person and mistaken identity concur with some of the French legal experts.[3]

1. (a) *Mawahib-ul-Jaleel*, Vol.6, p.240 and 243.
   (b) *Al Sharh-ul-Kabeer lil durdeer*, Vol.4, p.215.
   (c) *Al Mughni*. Vol.9, p.339.
2. (a) *Bada'e-wal-Sanae'*, Vol. 7, p.234.
   (b) *Nihayat-ul-Muhtaj*, Vol. 7, p.237.
   (c) *Al Iqna* Vol.4, p.168.
   (d) *Al Mughni*, Vol. 9, p. 339.
3. (a) *Kamil Mersy and Saeed Mustafa, Sharh Qanoon-ul-Uqoobat* p.356.
   (b) *Ali Badvi, Al Qanoon-ul-Janai*, p.356.

(305) Effects of Forgetting an Accountability

Forgetting means not to be able to remember a thing when required. The Shariah juxtaposes forgetting with mistake. Says Allah:

"Our Lord! Do not punish us if we forget or mistake!"
(2:286)

And the Holy Prophet brings us the tiding:

"My Ummah has been forgiven for forgetting and mistakes."

The Jurists differ on the question of the effect of forgetting on accountability. Some of them hold that forgetting is a common excuse for lapses in worship and for exemption from punishment. The general principle of the Shariah in this regard is that if anyone does an act unmindfully he is no sinner and, therefore, deserves no punishment. But if the unmindful person is exempted from criminal accountability, his civil accountability is not nullified; for the Shariah treats the life and property of human beings as blameless and the excuse as admitted of in the Shariah in the case of a person who forgets does not come into conflict with the protection guaranteed for life and property. What this view comes to is that if the offender forgets that the act he is going to commit is unlawful and commits it notwithstanding, he will not be liable to punishment but his unmindfulness does not invalidate the obligations incurred by his act. In fact he has to fulfil those obligations, when he realizes his transgression; or else he would be awarded the prescribed punishment. There are other jurists who think that forgetting is an excuse for punishment in the Hereafter, since punishment in that life pre-supposes intention of the offender. According to them forgetting is no excuse for the application of injunctions to mundane affairs, save those pertaining to the rights of Allah. In the event of a violation of divine rights, forgetting is to be treated as an excuse only when a natural motive of the commission of crime exists, while there is nothing to remind the transgressor of the unlawfulness of the act he is about to commit. For instance, in eating and drinking unmindfully when one is fasting, a natural tendency is at work, but there is

at the same time, nothing to remind the transgressor of the unlawfulness of his act. But in the case of violation of the right of an individual, forgetting can on no account be acceptable as an excuse.

Doubtless, there do exist such crimes as relate to the rights of Allah such as adultery and drinking; but it may be said of them that such cases are rare wherein forgetting is accepted as a lawful excuse; for a prohibited act is seldom forgotten. Moreover, there is the condition that a natural motive should be at work behind the criminal act the unmindful offender is going to commit, while there is nothing to remind him of its unlawfulness. Suppose for example a person who is recently converted to Islam feels thirsty and drinks wine unlawfully. Or take another example: a man divorces his wife but unmindfully enters into sexual intercourse with her.

In the light of both the views discussed above a mere contention of unmindfulness or forgetting is not enough for the exculpation of the offender. The first and foremost requirement which is absolutely essential is that the offender proves to have committed the offence unmindfully. Obviously, production of such a proof is extremely difficult. That is why the question of forgetting is of little consequence in a discussion of crimes. No person can prove on cogent grounds that he has been unmindfully guilty of an offence. According to the second view forgetting does not nullify obligations. These remain unaffected. If a person unmindfully guilty is necessarily liable to punishment, then forgetting will be treated as a case of doubt invalidating the *hud*. He will be liable to penal punishment instead. Thus in accordance with the second view the effect of forgetting on crimes is confined to certain limits. Under some circumstances the punishment of an unmindful offender is remitted, while under certain circumstances the punishment of *hud* will be invalidated.

1. (a) *A 'alam-ul-Moqi'een*, Vol.2, p. 140.
   (b) *Al-Ghazzali Al Mustasfa* Vol.1, p 84.
   (c) *Al Aamadi, Al Ahkam fi Usool-ul-Ahkam* Vol. 1, p. 217.
   (d) *Ibn Hazm – Al Ahkam fi Usool-ul-Ahkam*, Vol. 5, p. 149.

E. Effects of Victim's Willingness on Criminal Accountability

(306) Willingness vis-a-vis Criminal Accountability

A general principle of the Shariah is that even if the victim willingly allows the offender to commit an offence against himself the offence does not assume the character of a legitimate act for him; nor does the victim's consent affects criminal accountability of the offender except that willingness on the part of the victim invalidates one of the ingredients of the crime. Examples of such a crimes are stealing or grabbing the property of the victim. These are crimes when the property is taken without the owners consent. But if the owner is willing to part with it, then the act of the person taking possession of the property ceases to be an offence.

The above principle has been meticulously brought to bear on all crimes but the offences of taking life and inflicting injury. Logic demands that the principle in question should have been extended to these two offences as well; for in such cases no ingredient of crimes is invalidated by the consent of the victim. But what impedes the application of the principle under consideration is another principle of the Shariah itself which exclusively applies to homicide and infliction of injury. According to this principle the victim and his heirs have the right to remit the punishment of the offence in cases of homicide and infliction of injury. They may relinquish *qisas* in lieu of *diyat* or may forgo both. Subsequently, however, the competent authority may award penal punishment to the offender if he so deems proper.

The jurists differ on the question of the application of both these principles, just as they differ in cases of amputation of limbs or causing wounds on account of these principles. For this reason we propose to take up the problem of the victim's willingness in the case of his murder and then consider the consent of the victim with regard to the amputation of his limbs or infliction of injury to himself.

(307) Willingness to be Killed

Imam Abu Hanifa and his followers hold that permission of the victim to be killed does not warrant the validity of homicide because security of life cannot be withdrawn unless otherwise provided for in the Shariah. Obviously, no provision exists to this effect. Hence permission of the victim to be killed will have no effect and, therefore, it will remain an unlawful act punishable as wilful homicide. The Hanafites however, disagree as to the kind of punishment the offender is liable to in the case of the victim's permission to be killed. Imam Abu Hanifa, Yousuf and Muhammad are of the opinion that the permission of the victim would invalidate the punishment of *qisas* and treating his permission as a case of doubt the offender, in pursuance of the Prophet edit, will be liable to *diyat*. Says the Holy Prophet:

"Rescind *huds* in cases of doubt."

Now *qisas* falls under the category of *huds*. If the essential ingredient of the act entailing *qisas* is invalidated by doubt the offender will be free of *qisas*. *Imam Zafar* on the other hand, holds the view that permission is not susceptible of turning into doubt and, therefore, the punishment of *qisas* will not be annulled by it, but will be imperative.[1]

Most of the jurists belonging to the school of Imam Malik hold that permission of the victim does not warrant homicide, even if the victim forgives the killer for his murder before hand; for he forgoes a sight which he does not possess after his death and on this ground the killer will be treated as guilty of wilful homicide.

Some of the jurists subscribing to this view do not treat permission of murder as doubt and believe in the punishment of *qisas* in cases involving the consent of the victim, while others deem it doubt and advocate invalidation of the punishment of *qisas* and consider imposition of *diyat* instead of *qisas* obligatory.

One of the views advocated by the Malikite school, which Ibn-e-Arafa attributes to *Sahnoon* is that permission of murder does not make murder lawful but it invalidates both *qisas* and *diyat*. The killer may, however, be awarded penal punishment.

1. *Bada'e-wal-Sana'e*, Vol.4, p. 236.

But the well-known view of *Sahnoon* mentioned in *Al Atb'a*[1] is that as permission gives rise to doubt, the punishment of *qisas* to which the killer is liable stands annulled and he will be under the obligation to pay *diyat* instead.[2]

The school of Imam Shafi'ee, on the other hand holds two divergent views in this respect. According to one view the consent of the victim to be killed invalidates both *qisas* and *diyat* but does not make homicidal act lawful. The other view is that the consent of the victim does not warrant homicide, nor does it invalidate the punishment of *qisas*. Some of the jurists holding this view treat the permission of the victim as a case of doubt nullifying *qisas* and consider *diyat* mandatory, while a few others do not regard permission as a case of doubt and consider *qisas* obligatory.[3]

Imam Hambal and his followers hold that prior permission of the murdered person invalidates punishment because he has the right to remit punishment and the willingness to be murdered amounts[4] to the remission of penalty. This exactly is the explanation offered by the Shafi'ite advocates of the first view.

(308) Permission for Causing Injury to one's Self and for Amputation of One's Limbs

In the opinion of Imam Abu Hanifa and his followers permission for causing injury to one's self and for amputation of one's limbs, annuls punishment, for the organs of a person's body are not specifically different from his property and therefore invalidation of the punishment for their amputation or infliction of injury upon them is a case of doubt. The Hanafites however, differ in the case of death resulting from the dismemberment of an organ or injury. Imam Abu Hanifa is of the opinion that such an act leading to the death of the victim constitutes wilful murder. He argues that the victim allows only the dismemberment of his organ or causing wound to his body, but the resultant death of the victim shows that the act of amputation or infliction of wound is actually homicide, and the agent would consequently be liable

1. A Malikite book of Jurisprudence.
2. (a) *Al-Khattab. Mawdhib-ul-Jaleel,* Vol.6, p.235 and 236.
   (b) *Lil Durdeer, Al Sharh-ul-Kabeer* Vol. 4, p.213.
3. *Nihayath-ul-Muhtaj,* Vol. 7, p. 428.
4. *Al Igna,* Vol. 4, p. 171.

to punishment entailed by wilful murder; but as the permission of the victim involves doubt, the punishment of *qisas* will be nullified and the payment of *diyat* by the agency would be obligatory. Imam Abu Yousuf and Imam Muhammad on the contrary hold that if amputation of or injury to an organ of the victim results in his death, the offender will be liable to no punishment other than penal punishment because from the willingness for the amputation of one's organ or infliction of wound on one's body it follows that the result of this act that is, homicide should also be treated as forgiven.[1]

Imam Malik argues that permission of amputation and injury is not reliable except when the victim exculpates the offender also after commission of the offence. If he does not absolve him of the offence subsequently, the offender will be liable to the prescribed punishment. But if there is anything in the Shariah inhibiting to prescribed punishment the offender will have to pay *diyat* instead. However, if the victim persists in his exculpation of the offender even after the commission of the offence then the original prescribed punishments of *qisas* and *diyat* would stand invalidated and will be replaced by penal punishment provided that the victim does not die of the wounds inflicted upon or of the amputation of his organ. If he dies, the offender will be treated as wilfully guilty and will have to undergo punishment entailed by wilful murder.[2]

But according to the Shafi'ites permission of amputation and infliction of wounds totally invalidates the punishment, except that the society deems it fit to award penal punishment for such acts. But if any of such acts causes the death of the victim the offender would according to some Shafi'ite, be accountable for wilful homicide but because of the doubt involved in the permission of the victim, the punishment of *qisas* would stand annulled and the offender will be liable only to the payment of *diyat*. But other jurists belonging to the same school hold that punishment would remain void because death results from the act permitted by the victim, whose permission invalidates punishment.[3]

1. *Badae'-wal-Sanae,* Vol. 7, p. 236 and 237.
2. *Lil durdee, Al Sharh-ul-Kabeer,* Vol.4, p.213.
3. (a) *Nihayat-ul-Muhtaj,* Vol.4, p.246 and 248.
   (b) *Tuhfat-ul-Muhtaj,* Vol.4, p.30-31.

With Imam Ahmed permission of amputation and wound would invalidate punishment for these offences just as punishment for homicide is annulled by the permission of homicide. Although permission does not warrant an unlawful act, yet as the victim enjoys the right to remit punishment which he does remit, punishment stands invalidated.

(309) Grounds of Difference among the Jurists on Permission of Homicide and Infliction Injury

The basis of disagreement on this question is that the victim and his heirs have the right to remit punishment for homicide and injury. The prescribed punishment for these offences is *qisas*, which will however, be replaced by *diyat* in case if there is anything inconsistent in the Shariah with the enforcement of *qisas*. The victim and his heirs or guardians may in all circumstances relinquish the punishment of *qisas* and accept *diyat* instead or forgo both these punishments. If the person enjoying such a right remits punishment prescribed by the Shariah, what is left is only punishments which the competent authority may award in case the victim or his heirs remit the prescribed punishments.

This then is the basis on which difference of opinion among the jurists rest. Thus the jurists who maintain that permission invalidates punishment deem permission to imply prior remission of punishment. On the basis of prior remission they regard punishment as invalid. The jurists who hold that permission does not annul punishment do not accept permission as remission of punishment in advance; for according to them remission presupposes prior commission of homicide. Hence remission in advance will not be in order as no grounds exist for remission. In other words the victim's right of punishment owes its origin to the occurrence of crime. His remission of the punishment prior to the commission of the crime would therefore, be meaningless. It will be meaningless because the victim cannot possibly relinquish a punishment to which he has no right at all. The group of jurists who suggest *diyat* as the punishment for homicide in the case of prior permission by the victim deem such a permission as a case of doubt in the application of the relevant *hud* and consequently treat *qisas* as

void; while those who retain *qisas* as valid do not consider the prior permission of the victim as constituting a doubt nullifying *hud*.

What remains to be discussed now is the question of injuries or wounds that do not result in death. The jurists who think that punishment stands invalidated in such cases treat the punishment of amputation or infliction of injury by the victim as remission in advance; for remission is valid up to end of the act of amputation or causation of injury. On the contrary the jurists who maintain that punishment is valid in such cases take the invalidity of prior permission for granted, as no ground exists for the nullification of punishments. The condition laid down by these jurists for the invalidation of punishment is exculpation of the offender by the victim after the offence of amputation or infliction of injury is committed in full.

The jurists who regard punishment for death resulting from injury as invalid look upon death as ensuing from injury permitted by the victim. Hence they hold that the injunction applying to such an injury will also apply to its result. On the contrary, the jurists who treat punishment for death as obligatory, confine permission of the victim to injury and include his death in it. But as the permission of the injury causing death involves doubt, the punishment of *qisas* at any rate will be annulled.

(310) The Shariah and Man-made Law Compared

One of the principles of man-made laws in force is that willingness of the victim to be killed does not warrant homicide nor does it invalidate punishment unless an element of the offence is eliminated by the permission of the victim. The man-made laws are in harmony with the Shariah in so far as this principle is concerned. But the laws in question legalize certain offence on grounds of mutual consent of the parties involved, although their consent does not affect the nature of the offence at all. For instance, mutual consent in a case of adultery has no bearing on the nature of adultery; nor does the immoral and anti-social offence of adultery becomes a moral and socially commendable act on account of the mutual consent of the partners so also it is true of sodomy and defamation. These provisions of man-made laws are not only

repugnant to Islamic injunctions but are also incompatible with the principle mentioned above; for it provides that a crime ceases to be a crime if any of its element is affected by the willingness of the victim. So this is the case with larceny which becomes a lawful act when the owner of the property allows it to be stolen. But voluntary adultery does not affect the criminality of adultery: it remains an offence from moral social and cultural points of view whether committed voluntarily or otherwise:

The point to be noted here is that the willingness of the victim for being killed injured or for getting one's limb cut off does not produce any effect on the composition of a crime. Its effect is rather confined to the invalidity of the punishment thereof. The invalidity of punishment too does not owe itself to willingness of the victim or his heirs. It rather springs from the right of the victim or heirs to remit punishment.

The right of remission conferred by the Shariah on the aggrieved person or his heirs is not without its parallel in modern laws. These laws, as a matter of fact, allow such a right in cases bearing on a person's honour. For instance, the Egyptian law admits of a husband's right to remit the punishment of his adulterous wife. Under this law therefore, the sentence for adultery is negatived by the husband's remission of punishment even if it has been passed by the court and its execution has been commenced. But there is a difference between the Shariah and the modern law on this point. The Shariah has allowed the victim and his heirs the right to relinquish the basic prescribed punishments of *qisas* and *diyat*. But remission to these punishments by him or his heirs does not altogether invalidate the right of the society to punish the culprit. In fact, when public interest so requires, the culprit may be awarded a lesser punishment than the basic ones. Thus in cases of homicide, injury and amputation of limbs the victims right of requital is nullified or severe punishment is replaced by a lighter one. But remission of punishment by the aggrieved party does not totally negative punishment; whereas according to the Egyptian law, the punishment of the adulterous wife is totally invalidated by the husband's relinquishment and she is liable to no other punishment. It may be inferred from the foregoing discussion that the right conferred by the Shariah is restricted by

the demands of public interest, while the man-made laws in force provide for unconditional right of the victim to remit punishment. Although the modern laws do not admit of the victim's right of remission in cases of homicide, injury or amputation of limbs, yet here, too, remission on the part of the victim produces the same effects as does the principle of Shariah; for the laws in question generally provide for two punishments in the case of homicide, infliction of injury or the amputation of limb; and the court is invested with the power to choose either of them. In other words the court may prefer lighter punishment to severe one in consideration of the offender's circumstances. Now relinquishment of punishment by the victim or his heirs is an important circumstantial factor calling for the commutation of punishment. For instance, remission of punishment naturally requires the invalidation of civil compensation *(diyat)* for the offence.

Some modern laws like the German statute, treat the permission of the victim as effective in the case of homicide or attempted homicide, and drawing a line of distinction between murders with or without the permission of the victim regard the case of murder involving his willingness as a crime of different nature and consequently, provide for it lesser punishment. Such legal principles are but the extension of the doctrine of the Shariah.

The doctrine, however, has the distinction of containing the simplest solution to a difficult problem confronted by the modern courts. This problem presents itself when the question of killing a hopeless patient arises in order to relieve him of the constant agonies of a long disease.

(311) Accountability in Case of Suicide

The Shariah has declared suicide unlawful in the same way just as it has declared homicide a crime. It is forbidden both in the Quran and the Sunnah. Says Allah:

"And slay not life which Allah hath forbidden save with right." (17:33)

"Kill not yourselves. Lo Allah is ever merciful unto you." (4:29)

And the Holy Prophet has warned:

"The person who kills himself with a piece of iron will

reappear in Hell with the same piece of iron, beating, his stomach therewith; the person who kills himself by taking poison, will have the same poison in his hand committing suicide with it perpetually and the person who falls from the mountain by rolling himself to death, will be perpetually committing the same act of suicide in Hell."

According to the Shariah suicide both intentional and inadvertent is unlawful. Now if suicide is committed in full and the person committing it dies, such an act will not obviously, be punishable, as death invalidates punishment. However, the jurists differ on the question of expiation for it. The Schools of Imam Ahmed and Imam Abu Hanifa are of the view that suicide incurs no expiation. But Imam Shafi'ee holds that in the case of both wilful and inadvertent homicides expiation must be imposed on the property of the deceased. Some of the Hamblites also subscribe to the view advocated by Imam Shafi'ee but with the reservation that imposition of expiation is obligatory only on the property of one who commits suicide inadvertently.[1] Expiation is a devotional penalty which presupposes the personal good of the offender. The jurists who treat imposition of expiation on the property of the person committing suicide have taken into account this aspect of the problem.

Prohibition of suicide demands that the person having complicity in such a crime should also be regarded as subject to punishment whether his complicity consists of invitation, agreement or abetment.

If the act of suicide turns out to be abortive and the delinquent escapes death, then he will be liable to punishment for attempted suicide and if the attempt involves an accomplice, he, too, will be liable to penalty and will be awarded penal punishment.

As regards prohibition of suicide attempted suicide and complicity in such a crime most of the man-made laws in force like those of England, Sudan, Italy etc. are in agreement with the Islamic Shariah. But the Egyptian and the French laws do not treat suicide as a crime and therefore complicity in suicide under these laws is no complicity.

1. (a) *Asna-ul-Matalib*, Vol.4, p.95. (b) *Nihayat-ul-Muhtaj*, Vol. 7, p.365-66.
(c) *Al Mughni* Vol. 10, p.38-39. (d) *Bada'e-wal-Sanae'*, Vol.7, p.252.
(e) *Sharh lil durdee*, Vol.4, p.254. (f) *Mawahib-ul-Jaleel*, Vol.6, p.268.

(312) Injuring or Tormenting One's Self

It is unlawful under the Shariah to torture or injure one's self or cut off one's own limb intentionally or unintentionally. The person committing any of these acts will be liable to punishment. Since self-termination is declared unlawful by the Shariah, complicity therein also constitutes a crime.

There are many man-made laws that are in harmony with the Shariah in this respect. But there are certain other laws like the Egyptian statute which confines the offence of self-determination to definite persons in special circumstances.

(313) Accountability for Duelling

A single combat between two persons is called a duel, whether mutually agreed or incidental. In a duel both the rivals are determined to kill each other. Sometimes one of the combatants inflicts such a grievous injury on his rival that he is incapable of continuing the combat. No specific weapons are prescribed for a dual. Any weapons like swords, daggers, firearms or clubs may be used. A duel may be fought even with hands. What is significant in such a fight is that the combatants are determined to kill, wound or torment one other. But if a single combat aims at the demonstration of one's skill or superiority rather than torturing the rival, it constitutes one of the sport's permitted by the Shariah which we will discuss in the sequel.

But a duel which aims at tormenting wounding or killing the opponent is unlawful according to the Shariah. If he wounds his rival with the intention of killing him and the wound so inflicted results in the rivals death, he will be deemed guilty of homicide all the same. But in case if he wounds the victim for the purpose of incapacitating him without any intention of putting him to death, he will be treated as a deliberate aggressor. Should the victim die of the wound inflicted by him, the aggressor will be treated as guilty of quasi wilful homicide.

The Shariah, however, allows a single combat which aims at torturing the opponent only in war. In a battle fighting with the combatant as well as killing, wounding and torturing him is lawful under the Shariah; for in such a case the life of the enemy involves no guarantee of security. Similarly, in a battle combat

with a Muslim rebel is lawful, because the life of a rebel in a state of war is divested of the guarantee of security.

The Holy Prophet himself was challenged to a single combat in the Battle of *Uhud* and he accepted the challenge. He also allowed his companions to enter into single combats with the enemy on the occasional Battle of *Badr* and the Battle of Trenches. The jurists of Islam, therefore, regard duelling as lawful, whether the challenge for it is thrown or picked up by a Muslim soldier. But Imam Abu Hanifa does not consider it warrantable for a Muslim soldier to throw challenge for a duel; for he regards such a challenge as an aggressive or rebellious act; whereas other jurists hold that throwing a challenge for a single combat in order to demonstrate one's strength and frighten the enemy is warrantable.

It is necessary to differentiate between two cases of unlawful duelling. In the first case, both the combatants relinquish their lives by pardoning each other in advance. In such a case the principles applicable will be those we have dealt with in relation to the murder of the victim or causing him injury with his permission. In the second case neither combatant pardons his rival for taking his life. In this case the injunctions pertaining to homicide and injury will apply to the murderer or to the injury inflicted by him. Agreement between two combatants to duel will not necessarily affect the punishment incurred by the offence; for agreement does not mean willingness to be murdered or injured. Duelling is governed by the general provisions of forbidding homicide and infliction of injury because duel results in homicide and injury. There are provisions also which may be produced as a proof of the prohibition of duelling. For instance, Abu Bakr (R.A.A.) quotes the Holy Prophet as saying:

> "If two Muslims come out to measure swords in a single combat both the murderer and the murdered will be doomed to go to Hell. "O Messenger of Allah!" I asked, "The murderer of course, deserves to be doomed to perpetuate damnation, but why should the victim meet the same doom?" The Holy Prophet replied: "He deserves it because he also resolved to kill his rival."

There is another saying of the Prophet to the same effect-

"Abusing a Muslim is inequity and killing him is infidelity."

Nonetheless there is no need for these specific provisions to treat duelling as unlawful) because general provisions pertaining to murder and injury are enough to prove the unlawfulness of duelling.

If a duel results in the death of one of the combatants or in injury to his body, the act of homicide or infliction of injury will be imputed only to the agent and not to both the combatants. The resultant death of or injury to the victim cannot be treated as a case of death or injury caused by a collision between the combatants on the analogy of their mutual agreement to a duel, because death or injury caused by collision would be as result of the force with which they collide; whereas death or injury resulting from a duel is the outcome of the act or force of only one of the combatants and the action or force of the victim does not exert any influence on his death or injury.

If two cars collide and as the result of their collision a man is killed or injured the force causing the death or injury owes itself to the force and motion of the two cars. If the forces of the two moving cars had not collided, no casualty would have resulted. In the case of duel, on the contrary, the force or strength of each combatant is the cause of his act. Thus if one combatant slays the other or shoots him dead, the act and force of the victim will have no bearing on his death or injury.[1]

The position of the Shariah in relation to collision is in harmony with most of the modern laws. These laws including those of Egypt and France also prohibit duelling and provide for punishment of the murder, injury or pain caused by it. There are, however, some laws that prohibit duelling but contain specific provisions for specific punishment of the offences resulting therefrom, instead of applying to them the punishments laid down for culpable homicide and injury. Such laws include the Italian and the Polish statutes.[2]

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1. The reader is referred to *Muhammad Ibrahim*, p.113. The author treats duel as subject to the provision pertaining to collision, which is illogical. It leads to the conclusion that if the victim takes the position of self-defence or resistance, then every brawl or wrongful act should be regarded as subject to the provision relating to collision.
2. Kamil Mersy and Saeed Mustafa, *Sharh Qanoon-ul-Uqoobat*, P. 461.

F. Acts Connected with Crime and their Bearing on Accountability

(314) Acts Connected with Crime:

Such acts may be divided into three categories: Direct acts, Causal acts and acts constituting condition. A line of distinction should be drawn between these three kinds of acts in order to determine the identity of the offender.

Direct act (complicity) is that from which the crime stems of its own accord and which becomes the cause of the crime. For instance, the act of beheading. Beheading would automatically result in the victim's death and thus such an act would become the cause of his death. Again, take for example the act of stifling. It would kill the victim and simultaneously become the cause of his death. Direct act may be illustrated by examples other than cases of homicide. For instance, the act of applying fire to combustible matter which will not only cause fire but also burn the things all around. Similarly, taking away things furtively from the safe place where they are kept. This clandestine act not only results in larceny but also becomes the cause thereof. So also is it the case with drinking. It constitutes both the unlawful act of the use of liquor but also the cause thereof.

Causal act is that from which the crime does not intrinsically stem and which as such constitutes the cause of the crime. For instance, giving false evidence of murder against an innocent person. Such an evidence may be the cause of capital punishment but not the cause of death. The actual agent who causes death is the executioner who will translate into action the sentence of death passed by the court. Take another example. A person digs a well on the way and covers it in such a way that he falls into it. If the victim falls and is wounded or dies, then the act of digging well does constitute the cause of his injury or death; but injury or death does not result from the act of digging the well itself but is rather the outcome of victim's falling into it.

In short, what distinguishes a direct act from a causal act is that a crime directly stems from the former, while the latter either causes the crime directly or serves as a means to the commission of a direct act.

Perceptible Cause

Perceptible cause may be defined as one leading to the commission of a direct act in a perceptible or tangible manner, whether or not such a cause is material or inherent. Perceptible cause may be illustrated by such acts as forcing a person to wound or kill the victim as the act of coercion incites the offender to commit murder or inflict injury. Digging a well on the way of the victim and covering it in a manner that the victim falls into it and is either injured or dead; setting fire to the house wherein the victim is fast asleep and when he wakes up he finds himself engulfed by the flames and is consumed by them; letting loose a beast to hunt down the victim and the beast tears him off and bidding an immature child to kill someone and the child accordingly kills him.

These then are material and inherent causes which perceptibly and tangibly lead to the commission of crimes.

Legal Cause

Legal cause is that from which the act directly originates in conformity with the law in force, that is, the act is grounded in legal provisions; for instance, giving false evidence in a case of murder or larceny. Such an evidence induces the judge to sentence the offender to death or the amputation of hand as the case may be and execution of such a sentence results in his death or amputation of hand. Another example of the legal cause is provided by the case of a judge who intentionally and callously condemns the offender to death or awards him the punishment of amputation of hands and the execution of such a sentence results in the death of the offender or amputation of his hand.

Common Cause

A common or known cause is that which does not give rise to an offence in conformity to legal provisions or in a perceptible manner but results in a manner commonly known; for instance, killing someone by serving him poisoned food or by threatening or terrorizing him or by bewitching him or by using similar mystic methods. Commonly known causes also include those perceptible causes which may give rise to doubts and controversy

by virtue of being 'far-fetched, as for example if someone lights fire in the victim's house with the intention of killing him and the victim is burnt to death, his act would be the perceptible cause of homicide; but if the victim escapes with burns on his body and is admitted to a hospital. The building of the hospital collapses and the victim is buried and killed under its debris, the offender in such a case becomes the known cause of murder because of the doubts and controversy arising out the case.

The commonly known cause may either be material or inherent. It is socalled because people are familiar with its causality and is acceptable to their common sense.[1]

An act comprising condition is one which neither causes an act nor an act ensues from it but it gives rise to an act which becomes the cause of crime; as for example person hurls the victim into a well dug by someone else with no intention of killing him but the victim dies all the same. In such a case the act of digging the well does not constitute the cause of the victims death. His death results from the act of hurling into the well and this act is precisely the cause of death. But the act of hurling would not have taken place without the existence of the well. In other words the existence of well is the condition of murder resulting from hurling the victim into it.

(315) Provision as to Direct, Causal and Qualificatory Acts

If the person doing a qualificatory act does not mean to interfere in the commission of a crime or to facilitate or abet it, he incurs no accountability; for the crime does not stem from his act nor does his act constitute the cause thereof. Had such a case been confined to his act, the crime would not have occurred. Although the act done by him becomes the condition of a crime, yet the agent does not do it with criminal intent. However, the person doing a qualificatory act will incur criminal accountability if he intends to have complicity in the crime or facilitate or abet its commitment. Thus if anyone pushes the victim into a well dug to irrigate the fields, the person who gets the well dug will

1. (a) *Nihayat-ul-Muhtaj*, Vol. 7, p. 240.
   (b) *Al Ghazzali, Al-wajeez*, p.122.
   (c) *Asna-ul-Matalib*, Vol. 4, p.4.

in no way be responsible for the criminal act; but if he has the well dug with the intention of facilitating the commission of crime, he too will be accountable for it. Similarly, the person who induces the victim to accompany him to the spot where he is killed in order to facilitate his murder he will be accountable for the crime. But if he is not in the know of any plot to murder the victim, he would incur no accountability.

An offender having direct complicity in a crime and one playing the role of the causal factor in the commitment thereof are both accountable as their acts constitute the cause of the crime. No commitment of crime is possible unless the act of either a direct or causal accomplice is involved. However, if it is in the power of the victim to retrieve the harm done to him by the act committed by the direct or indirect accomplices, the question of the limitation of their accountability deserves careful consideration. The jurists have laid down the following rules in relation to this problem:

(i) If the nature of offence is such that it necessarily leads to its commitment and admit of no resistance, then the offender is accountable whether he is a direct accomplice or a causal one. Lack of resistance in self-defence on the part of the victim cannot be relied upon; for the offence stems out of the act committed by the offender and it is precisely this act that constitutes the cause of the offence. The victim's abstinence from indifference to or neglect of self-defence has nothing to do with the occurrence of the criminal act. It is not possible either that the behaviour of the victim becomes the cause of the offence. Suppose, for example that a person wounds another person with the intention of murdering him and the victim avoids to get medical aid or is indifferent to availing himself of the chance of treatment. Consequently he succumbs to his injuries. This is a case of wilful murder and the offender will be accountable for it as such.

(2) If the crime does not by nature lead to its commitment and admits self-defence on the part of the victim, but the victim offers no resistance, then the offender will be held responsible for his act only and not for the consequence of the act, because it does not of its own accord produce the result, nor constitutes the cause thereof. Such a result actually owes itself to the non-

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resistance or lack of self-defence on the part of the victim. Take for example another case of similar nature. A person throws another person into the water, wherein he cannot be drowned. But the victim lies in the water and drops off or is frozen to death because of intense cold. In such a case the accountability of the offender will be limited to his act of throwing the victim into the water. He cannot be held responsible for the resultant death of the victim provided that the deceased is able to come out of the water but does not intentionally do so. But if in consequence of the offender's act of throwing him into the water itself the victim's body is benumbed or bone is broken or he becomes unconscious and is therefore, unable to come out of the water and is finally drowned, then the above act of aggression committed by the offender in itself is the cause of the offence and the person throwing the victim into the water will be accountable for the murder of the victim.

There is no difference of opinion among the jurists on the foregoing rule; but they do differ on the question of its application. Jurists belonging to the school of Imam Shafi'ee are of the opinion that if a person phlebotomizes another person and does not close up the wound with the result that the latter bleeds to death; person performing phlebotomy will not be accountable for his murder because the act of phlebotomy in itself does not lead to death. Had the deceased himself taken necessary measures to stop the bleeding he would not have bled to death. But the Hamblites hold the phlebotomist responsible for the victim's death, inasmuch as he opens the vein of the victim and this act admitting of no resistance or self-defence on the part of the latter causes his death.[1]

(3) In cases wherein the act inherently leads to the commitment of offence but self-defence on the part of the victim is easy, the jurist disagree. There is a variety of such cases. Let us for example take two such cases. A man who can swim is thrown into the water but he does not swim and allows himself to be drowned; or a man is pushed into a small fire from which he can easily escape, but does not do so and is consequently

1. (a) *Al-Wajeez*, Vol.2, p 22.
   (b) *Al Mughni*, Vol.9 p. 326.

burnt to death. In both these cases and the cases of like nature there is difference of opinion among the jurists. Some of them hold that the person guilty of such an act is a murderer. They argue that a person who is thrown into the water may be horrified and is incapable of swimming and is consequently drowned. Again, the limbs of the person who is thrown into the fire will become stiff and he will be unable to move. They also advance the argument that no person would resign himself to death. The death of the victim in this case would, therefore, be treated as the result of his being thrown into the fire. Other jurists, on the contrary, maintain that if the victim can swim or can move out of the fire, but does not do so, then the person throwing him into the fire or water will not be treated as the killer.[1] According to both the groups of jurists, the offender is criminally accountable. But the first group holds him responsible for murder; but the second group treats him accountable to the extent of throwing the victim into the fire or water. But the jurists who treat him as murderer do not hold him guilty of wilful homicide. They rather treat him as one guilty of quasi-wilful homicide on the ground that the kind of act he commits does not always result in death.

(316) According to the principle of Shariah both the direct and indirect accomplices will be criminally accountable for their respective acts, but this parity in accountability does not mean that in the *hud* cases they should get equal punishment; for in such cases the punishment of *hud* can be awarded to the direct accomplice only.[2] The indirect accomplice is not liable to *hud* punishment. He would get only penal punishment for his part in the commission of the crime. Explanation of the principle in question may be this that a crime in the real sense of the word should be committed directly and it is thus that the *hud* crimes are committed. Such crimes are seldom committed causally or indirectly. Since the punishments of *hud* are severe, they have

1. (a) *Nihayat-ul-Muhtaj;* Vol.7, p.243-45.
   (b) *Al Mughni* Vol.9, p.326.
   (c) *Al Behr-ul-Raiq*, Vol.8, p.294.
   (d) *Mawahib-ul-Jaleel*, Vol.6, p.240.
   (e) *Al Sharah-ul-Kabeer lil dardeen*, Vol.4, p. 215-216.
2. (a) *Al Muhazzab*, Vol.2, p.189.
   (b) *Al Sharh-ul-Kabeer*, Vol.9, p.342.

been confined to the cases of direct commission of crimes which comprise the actual and frequently committed crimes.

Although the punishment of *qisas* have been prescribed in the same way as the punishments of *hud,* yet according to Imam Malik, Shafi'ee and Ahmed the punishments of *qisas* may be awarded to both the direct and the causal accomplices; for the *qisas* crimes are mostly caused by the indirect accomplices. If their punishments are to be confined to the agent, the provisions for enjoining *qisas* would cease to be effective because the offender would abandon the direct mode of committing the offence and would resort to the causal mode instead. The position of Imam Abu Hanifa, on the other hand is that the punishments incurred by the agent and the causal accomplice cannot be at par and that the agent is liable to *qisas*, while the punishment of *qisas* incurred by the causal killer is invalid in spite of the fact that he treats both direct and causal cases of murder as a case of wilful homicide.[2] The Imam argues penalty for wilful murder is *qisas* which actually means similarity. As *qisas* in itself consists of the act of killing directly, it is necessary that act for which *qisas* is awarded should also have been committed directly. The reason for this is that the very basis of *qisas* is similarity; for instance a person digs a well with the intention to killing another person so that he may fall into it. Such an offender will not be liable to *qisas*, since digging of well on the spot does not directly result in the death of the victim although it does constitute the cause of his death. Again, a person gives false evidence against another person to the effect that the latter is guilty of an act punishable by death. On the basis of the false evidence the accused is sentenced to death. In such a case the witness giving false evidence will not be liable to *qisas*. Although his false evidence does constitute the cause of the death penalty awarded to the accused, yet it has not directly resulted in the death.[3]

1. (a) *Al Mughni,* Vol.9, p.331.
   (b) *Asna-ul-Mataiib,* Vol.4, p.5.
   (c) *Mawahib-ul-Jaleel,* Vol.4. p.241.
2. *Imam Abu Hanifa* regards causal murder as a case of direct murder in case if the agent serves as a tool in the hand of the causal killer, as for example when he acts under duress.
3. *Bada'e-wal-Sanae',* Vol.7, p. 239.

In the case of penal crimes, there is no specific difference between the punishments incurred by the agent and causal accomplice for the punishments laid down for such offences are of penal nature. But this does not mean that the quality and quantity of punishments to which the two kinds of offenders are liable must be at par; for no limits have been determined for penal punishments. The court is empowered to choose any of the penal punishments at its discretion and award the maximum or minimum of such punishments.

(317) Limits of the Agent and the Causal Offenders Accountability in combined cases of Direct and Indirect Complicity

(a) In a combined case of casual and direct complicity the accountability of the agent and the causal offender will be determined in accordance with the following three circumstances.

(b) When causal factor gets the better of direct complicity. This happens when direct complicity does not aim at transgression. In such a case the causal offender will be held accountable for the offence and not the agent as for example slaying the witness whose false evidence leads to the death sentence of the accused. Execution of such a sentence through the executioner is the direct commission of murder while false evidence is the cause thereof. As the act of the executioner does not involve transgression, the causal factor which is the witness giving false evidence will be treated as the killer. Similarly, whenever the cause dominates the direct commission of crime, the agent's accountability will be void and the person who causes the offence to be committed would be deemed accountable.[1]

(c) When direct complicity gets the better of causal factor. This happens when the causal act has already come to an end. Suppose for example, a person throws the victim into the water with the intention of killing him. But another who is already swimming in the water stifles him to death. Take another example: a person hurls down the victim from a great height; but before he comes down to the ground below another person slays him

1. (a) *Asna-ul-Matahb,* Vol.4, p.6.
   (b) *Mawahib-ul-Jaleel,* Vol. 6, p. 241.

with his sword or shoots him dead. In this case the direct accomplice alone will be accountable and therefore, liable to *qisas* and causal offender would deserve penal punishment. The latter will not be held responsible for the consequence of his act.

Some of the jurists hold that direct complicity does not sever the process of causation when it is improbable to escape from this process. For instance, a person hurled down from a great height cannot obviously survive. But suppose before he lands on the ground below someone pounces upon him and beheads him with his sword. In such a case causation is equivalent to direct complicity and, therefore, both the agent and the causal offender will be accountable for the murder of the victim. The reason for this is that the act of each is complementary to that of the other. But if the victim survives the causal act and the direct complicity severs the process of causation in a manner indicated above then the agent alone will be held accountable for the murder.[1] It must be borne in mind that in all these examples it has been supposed that there is no previous agreement between the agent and the offender to the commitment of the offence.

According to the position taken by Imam Abu Hanifa, whenever direct complicity and causation is combined and the former aims at transgression, direct complicity will get the better of causation so much so that the relevant provision would bear on the agent and not on the causal offender.[2] But the bearing of the relevant provision on the agent does not lead us to the conclusion that the causal offender should be completely exculpated. On the contrary, if his act amounts to a crime, he will be accountable to the extent of his act.

The importance of this act is evident in the *hud* and *qisas* offences; for the result of the dominance of direct commitment of crime over the causation thereof and the consequent bearing of the relating provision on the agent would be that the punishments of *hud* and *qisas* would be limited to the agent alone and when this happens the causal offender would be liable to penal punishment.

1. *Al Mughni*, Vol.9, p. 385.
2. (a) *Ishbah wal Nazair*, p.81.
   (b) *Mujallat-ul Qanoon Wal Iqtisad Alsinath-ul-Sadisa*, p. 581.

(d) **When causal factor and direct complicity are at part.** In case if the cause and direct complicity play equal role in the commitment of an offence the causal and direct accomplices both will be accountable for the consequence of the criminal act; as for example, coercing the agent into the commitment of murder or ordering him to kill the victim. In such a case the person forcing the agent to commit the offence and the agent acting under duress, or the person commanding the agent and the agent so commanded both will be held accountable for the homicide.

However, the position of Imam Abu Hanifa is that cause can never be at par with direct complicity. In fact he brings to bear the relevant provision on direct complicity in case if it is combined with causation and the agent commits the criminal act with the intention of violating the provision of the Shariah. His position in this respect is at variance with Imam Malik, Shafi'ee and Ahmed. It is also noteworthy that Imam Abu Hanifa does not treat the person exercising under duress as accountable because cause and complicity come to be placed at par but because he holds that if the agent serves as a tool in the hands of the causal accomplice in the same way as the weapon of murder. The causal accomplice will not merely be the person causing the offence but also assume the character of the agent committing it.

(318) Relationship between Causation and Accountability

The accountability of an offender for the offence imputed to him presupposes that the same acts brings forth the offence and that causational relationship subsists between the act he commits and the consequence for which he is accountable. If the consequence of an act is contiguity there to and the offender's act is direct commission of the offence, then it is not difficult to say that there is cause and effect relationship between the act and the consequence thereof. If the offender's act is causal and not direct commitment of an offence, it is extremely difficult to assert in most cases that causational relationship exists between this act and the consequence thereof; for consequence of causal act is contiguous thereto. These difficulties become the more pronounced in the case of the plurality of causal factors leading to the same result and when some of these factors bring forth other causes,

while cutting short the causational process of some other factors. Such difficulties are also great when consequences are remote and there is a series of causes between the acts and their results. We discuss here these legal difficulties and the relevant injunctions.

(319) Multiple Causes of Consequence

The rule is that if the act of the offender alone is the cause of the consequence or, considered in isolation,[1] has something to do with the consequence, the offender will be accountable for the consequence of his act. In other words, the offender would be accountable for the offence committed by him, whether the consequence is brought forth by his act alone or it is one of the various factors leading to that consequence. For instance, a person injures another person with the intention of killing him and the victim succumbs to the injury. The aggressor in such a case would be accountable for wilful murder. Again, suppose that a number of wounds have already been inflicted on the victim, the offender finally inflicts the fatal wound and the victim dies of all wounds. The offender inflicting the last wound would be accountable for intentional homicide, although the death of the victim is caused by all the wounds regardless of the fact whether those wounds were inflicted on his body by the victim himself or somebody else or his body is torn by a beast.

If the wounds already inflicted on the victim were caused by a legitimate act like self-defence and the offender inflicts upon him several wounds subsequently with the intention of killing him with the result that the victim succumbs to the injuries, then the offender will be accountable for wilful homicide, even if the numerous fatal blows and wounds are the result of warrantable act. The same injunction is applicable to the case wherein the blows and wounds previously inflicted on the victim were unintentional as well as to the case wherein the wounds or injuries are causes to the victim lawfully after and not before the wounds or injuries inflicted by the offender.

If some wounds caused to the body of the victim are more serious than others the person inflicting relatively minor but fatal wounds or wounds resulting in the victim's death, will be

1. It is assumed that the offender is not concerned with other agents.

accountable for wilful homicide, although the wounds caused by him may be relatively minor. The number of wounds inflicted by each offender respectively cannot be relied upon in this matter. If a hundred injuries have already been caused to a person and the culprit inflicts a single fatal blow which, taken as a separate act, constitutes a causal factor leading to the victim's death such a culprit will be accountable to intentional homicide even if the hundred injuries already inflicted may have been caused by a single person subjecting the offender to violence before the culprit.

Again, if the victim or murdered person is a sick or old man or a minor and the offender inflicts such a blow on him as may not kill a healthy or young person but it does kill a sick man and the like, the offender will be accountable for wilful murder.

(320) Discontinuation of Offender's Act

The offender will be accountable for his act unless his act is cut short by the act of another person however, if his act is overwhelmed by the act of another offender and it is discontinued, then he will be accountable to the extent of the act he may have committed and for the consequence thereof. For instance, if a person fatally wounds the victim with the intention of killing him and the victim dies, he will be accountable for wilful murder. But in case if another person intervenes and beheads the victim who is fatally wounded by the first offender, the latter will be treated as the aggressor and not as the killer; for the act of the second offender his act is discontinued and is no longer effective.

In case if the offender intends the consequence of his act but his act becomes ineffective and does not produce the desired result he will be held accountable for his act only and not for the consequence. Suppose a person wounds the victim with the intention of killing him but the victim's wounds heat up. In such a case the offender is accountable as an aggressor and not as a killer, because the wounds cease to be effective and do not result in the victim's death.

(321) Accumulation of Causes

We have stated that the offender will be accountable for the consequence of his act if his act alone produces that consequence

or plays a part in bringing it about. This is a general principle of the Islamic Shariah. Application of this principle is a very simple affair when the act of the offender directly produces the result. For instance, he butchers or beheads the victim. Such an act would be the direct cause of the victim's death. But things are not always that simple. In many cases the offender's act does not directly bring about the consequence. A variety of other causes accumulate and intervene between the offender's act and its consequence with the result that the causational relationship between the two is weakened and the act being far removed from its result ceases to be the direct cause thereof. Let us suppose, by way of illustration, that the offender wounds the victim with the intention of taking his life. The victim is later admitted to a hospital. But the building of the hospital catches fire and the victim is burnt to death. Now the question arises if the offender is responsible for his death on the ground that the wound he inflicts leads the victim's admission to the hospital and that in its turn causes his death or if the offender is accountable for only wounding the victim. The same case may be illustrated by another example. Two witnesses give false evidence in the case of an accused to the effect that he is the killer of such and such person and the accused is not only condemned to death but his death sentence is carried out. Later on it is found out that the accused was innocent. It may be asked if the false witnesses are to be treated as killers because their evidence resulted in the court's death sentence against the accused and in pursuance of the sentence the executioner killed the accused.

In order to remove these legal difficulties, the jurists have classified causes into three categories:

(a) Perceptible Causes

Perceptible causes are those which produce results in a tangible and perceptible manner without involving any element of doubt, whether the result directly follows the cause or is produced by the second cause which in itself is the effect of the first cause. In short, whenever the offender's act is the perceptible cause of the consequence, the offender will be accountable for the consequence. Suppose for instance the offender sets the victim's

house on fire with the intention of killing him and the victim is fast asleep therein. On waking up he finds himself engulfed by the flames and is unable to escape. Consequently he is consumed by the flames. In this case the offender sets the victim's house ablaze and this act of his becomes the cause of the burning of the house and this in its turn becomes the cause of the victim's burning to death.

(b) The Shariat Causes

These are causes leading to consequences for which an offender is accountable according to the provisions of the Shariah; for instance a false witness would be regarded as accountable for the murder of the accused sentenced to death. Under this category of causes the offender is to be held accountable for such consequence of his act as is subject to the provision of the Shariah, even if the result is far removed from the cause and the causational relationship of the act is weakened.

(c) Acknowledged Causes

Every cause which is not a perceptible or *a Shariat* cause is an acknowledged cause. Such causes are imputed to the received opinion inasmuch as they are generally known to and acknowledged by the people and are also convincing. The relevant provision enjoins that the offender is to be treated as responsible for all the consequences of his act if the received opinion requires, no matter how long the series of causes may be; but if the received opinion inhibits the accountability of the offender, he will not have to account for the consequences of his act. Suppose that the offender makes a hole in the boat to be boarded by the victim so that he may be drowned. When the boat is about to be submerged, the victim jumps out into the sea to be able to swim to the bank but a big fish devours him. In such a case the offender will be held accountable for homicide. Although the offender's act of making a hole in the boat is not the direct cause of the victim's death and what it directly results in is the sinking of the boat, which in itself leads to the victim's jumping into the sea and his being subsequently devoured by the fish. The result is the direct cause of his death. Yet, notwithstanding the distance, between the offender's act and its consequence and the numerous intervening

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causes, the offender will be accountable for the consequence of his act, because the evident causational relationship between act and the consequence remains intact and according to the received opinion he is treated as the killer. Let us take another example. The offender inflicts such serious wounds on the victim that he has to be admitted to the hospital. Subsequently the building of the hospital collapses because of an earthquake and the victim is buried and dies under its debris. The offender in this case would be accountable as an aggressor and not as the killer, although the cause of victim's death is the collapse of the hospital and the cause of his admission to the hospital is the wound inflicted by the offender. But the offender cannot be deemed guilty of homicide according to the received opinion. Consider another case. A sorcerer practices black art with the intention of killing a person and the person really dies. The sorcerer will not be held responsible for the death of the person in question. He will have to account only for the magic acts he commits and not for the consequence thereof; for our current common knowledge does not acknowledge that a man can be killed by sorcery.

(322) The Shariah Doctrine of Causality

From what has been stated above it is possible to infer the Islamic doctrine of causality. According to this doctrine an offender is not accountable for the consequence of his act unless causal relationship subsists between his act and the consequence, or there is such a relationship by virtue of which the cause is linked with the effect. In the presence of such a relationship the offender is accountable for the consequence of his act. But if it is absent or it does exist prior to the occurrence of the consequences but is severed by some natural phenomenon or by the act of somebody else, the offender's accountability will be confined to his act to the exclusion of the consequence thereof.

No such condition is laid down that the offender's act alone brings forth the consequence. It is enough that his act is one of the active causal element in bringing about the criminal result, whether the offender's act alone produces that result or various such other causes co-mingle with the act to bring it about as relate to the victim himself or some other person or the victim's natural and physical condition.

At any rate, the offender is accountable whether his act is the direct cause. He is accountable even if the consequence of his act is the cause of some other cause or such numerous causes as are brought forth by the offender's act provided that according to the received opinion the offender is to be held responsible.

Plurality of causes is not to the liking of the Islamic jurists. They are apt to limit their number by received opinion. Whatever the received opinion regards as the cause of a consequence is, according to them the cause thereof, no matter however remote it may be likewise anything which the received opinion does not consider to be the cause of a consequence, is not the cause however close it may be.

The position taken by the jurists of Islam is not only consistent with the principle of justice but also with the nature of things. On the contrary, if they had confined the causality to the direct cause in the case of wilful murder, as the French scholars of law do a great number of such acts would have been excluded from the category of causes as the received opinion and common sense accept as causes. Again, had they gone to the other extreme and included indirect causes, then many an act which the received opinion and common sense does not accept as the causes would have fallen within the gamut of homicide.

In short the Shariah doctrine of causality is very flexible and is in harmony with the received opinion and common sense. As it rests on general consciousness and sense of justice it is also just and equitable. Declaring conventional opinion as the criterion of causality for the purpose of enquiry into the cause of a consequence, also ensures the co-existence of the Shariah doctrine of causality with the survival of human race on earth; for all men have a common opinion and a universally recognized canon of justice by which they are satisfied whether they are civilized; ignorant or educated. That is why the doctrine of Shariah is in consonance with their conventional opinion and concept of justice.

(323) Difference between Man-made Law and the Islamic Shariah

The Islamic doctrine, though the oldest, is much better

than the French and is consistent with the latest doctrines of law that have come to light.

The French law pundits recognize only the direct cause in causes of wilful homicide. Such a cause is that which leads to the death of the victim and there are no other factors intervening between that cause and the victim's death, which in themselves lead to his death or are ancillary to his murder. For example, a person strikes another person with the intention of killing him and the victim is wounded. But the victim neglects the treatment of the wound or does not care to receive proper treatment or is too weak for the injury and finally succumbs to it. In such a case his indifference to treatment or infirmity is conducive to the occurrence of his death. Now according to the French scholars of law the blow of the aggressor and the resultant injury will not be regarded as the direct cause of the victim's death, inasmuch as there are certain other conducive factors at work, without which the victim would not die.

The French legal pundits apply this theory only to cases of intentional murder. They see no harm in recognizing indirect cause in the case of inadvertent homicide. This discrimination between wilful and inadvertent homicide is indicative of the fact that their doctrine is not tenable; for if justice demands that in a case of wilful homicide only the direct cause should be taken cognizance of, then it will be sheer injustice to recognize indirect cause also in a case of inadvertent murder. If justice demands that in a case of inadvertent murder indirect cause should also be recognized, how can the demand of justice be fulfilled by refusing to recognize such a cause in the case of wilful murder.

The latest theories of causality admit of both the direct and indirect causes. These theories which have been introduced into the laws of various countries originated in the laws of Germany, England, Italy and Switzerland. The German concepts of causality typify all these theories. We, therefore, content ourselves with a discussion of the above concepts.

The first concept of the German law relates to the strongest and the active cause. According to it the offender will be accountable for the consequence of his act when his act is the basic factor in bringing about the consequence, although there may be other

factors at work conducing to it. For if these factors do not play essential role in bringing forth the consequence, they assume the character of its condition and are not its causes. But if any of these factors plays the primary role, the consequence of the act would be imputed to that factor and the offender's act would be reduced to a condition of the consequential event. The objection raised to this concept is that it draws a line of distinction between the factors leading to the consequence on the basis of their strength and weakness; whereas strong and weak factors both are necessary for bringing it forth. Even if the weakest factor is absent, the whole complexion of consequential situation would be changed.

The second concept is the theory of equity which aims at removing the flaw inherent in the first concept. It does of discriminate between the various factors but treats all of them alike. It lays down that the act of the offender alone is the primary factor and is also the cause of the consequence produced thereby; for had this act not been committed, its consequence would not have manifested itself. Therefore the offender will be treated accountable for the consequence by ignoring all the habitual and unhabitual factors, whether such factors relate to the victim's act or the act of someone else whether they stem from the natural disposition of the offender or from the state of the offender's health and whether or not the offender's act is disconnected from those factors.

This doctrine of equity has been criticised on the ground that it holds the offender even when his act is disconnected from the act of somebody else and the act of the latter has clearly been the cause of the occurrence of the consequence. Under this doctrine the existence of numerous causes are recognized and the offender is notwithstanding, treated as accountable for the consequence of his act inasmuch as all those causes stem out of his act even if his act ceases to be effective before the consequence occurs.

After the two foregoing concepts, the German pundits of law have expounded the latest theory which is known as the doctrine of appropriate cause. This doctrine, though based on the concept of equity, seeks to remove the weaknesses of the concept in question. According to it the offender is held responsible for the consequence of his act when his act may be deemed the

appropriate cause of the occurrence of the consequence. A cause is regarded as appropriate when it is enough to bring about a consequence in conformity with the received opinion and the nature of things.

This German doctrine of the appropriate cause rests on the same ground as the Islamic doctrine, and in the determination of the order of accountability both of them produce identical effect. The Islamic law, however, has precedence on the German law by thirteen hundred years. The latter has had to undergo a long process of change and evolution before accommodating itself with the Islamic Shariah.

Section II

Cessation of Accountability

(324) The Cause of the Cessation of Accountability

As has already been stated there are three fundamental elements of criminal accountability: (a) Commitment of Unlawful Act. (b) Agent's Freedom of Choice. (c) Agents Understanding. All the three elements are essential for criminal accountability. If any of them is absent, the agent will not be liable to punishment. But invalidation of punishment does not spring from a single definite cause. As a matter of fact if the act committed is not unlawful, no accountability is incurred at all; for accountability presupposes unlawfulness of the act.

In case if the act is lawful but the person committing it is bereft of the freedom of choice or is devoid of understanding, his accountability remains intact but he ceases to be liable to punishment on account of the absence of the freedom of choice and lack of understanding.

In other words the cause of the cessation of hostility relates either to the act or to the agent. In the former case the act is lawful; while in the latter the act remains unlawful but the agent is not liable to punishment.

(325) Ground of Legitimacy

According to the Islamic Shariah an unlawful act is legitimatised by various causes, but all such causes pertain to the exercise of a right or performance of a duty. In other words, exercise of rights and performance of duties make certain acts lawful and absolve the person committing it of accountability, while they remain unlawful for all the other people. The reason for this is that the Shariah treats the unlawful act in question as the right of a particular individual or makes it mandatory for him

and thus permits the person to do the act which is originally forbidden for others.

(326) Ground of Invalidation of Punishment

A person guilty of an offence is exempted of punishment on the following four grounds:

(a) Duress. (b) Intoxication (c) Insanity. (d) Tender Age. Punishment becomes void in the four states mentioned above in the absence of freedom of choice and understanding notwithstanding the unlawfulness of the act the person in question is guilty.

(327) Remission of Punishment

Apart from all these principles there is yet another principle under which the Shariah remits the punishment of an offender in spite of his liability and in spite of his being guilty on grounds of freedom of choice and understanding. This principle is actually an exception from the general rules. It is designed to persuade the offender to repent in cases of serious crimes and to abstain from them. The relevant Quranic injunction first provides for penalty for a sanguinary offence and then gives the above principle regarding such a dangerous offence. Says Allah:

> "The only reward of those who make war upon Allah and His Messenger and strive after corruption in the land will be that they will be killed or crucified or have their hands and feet on alternate sides cut off; or will be expelled from the land. Such will be their degradation in the world and in the Hereafter theirs will be an awful doom; Save those who repent before ye overpower them. For know that Allah is Forgiving, Merciful." (5:33-34)

So far as sanguinary crimes are concerned the above provision is indisputably applicable. But the jurists differ on the question of its extensibility to other *hud* offences as has already been discussed.[1] It can undoubtedly be extended to the penal crimes provided that the competent authority deem such a measure proper in public interest.

(328) Difference between the Shariah and the Man-made Laws

The very grounds of cessation of accountability as laid down in the Shariah and dealt with above are to be found in the modern laws in force and from the qualitative point of view both the laws contain similar provisions as to the nullifying grounds of accountability. For instance the Shariah treats a forbidden act as lawful in exercise of one's right and discharge of duty and such an act ceases to be an offence. Similar provision is contained in the Egyptian statute and other man-made laws in force. As the Shariah invalidates punishment for an act done under duress in a state of intoxication or in tender age so also do the man-made laws. Again, these laws rescinded punishment just as the Shariah does when the offender repents or abstains from the commitment of a serious offence before he is overcome or apprehended.

The difference between the Shariah and the man-made laws in force is that the Shariah had been familiar with matters like grounds of legitimacy, recession and remission of punishment thirteen centuries or thirteen hundred years ago; whereas the man-made laws came to be acquainted with them towards the end of the nineteenth or the beginning of the twentieth century.

1. Please see Article No. 253.

A. Grounds of Lawfulness

Exercise of Rights and Discharge of Duties

(329) The Cause of Legitimatising Forbidden Acts

A general principle of the Shariah is that forbidden acts are unlawful, in general, but the Shariah admits of an exception to this principle and warrants forbidden acts by a person with certain peculiarities. The admissibility of such acts in the Shariah are necessitated by circumstances of the individual and conditions obtaining in the society. The individuals for whom such acts have been legitimatized are those who realize some object of the Shariah. Murder, for instance, is unlawful for all the people and a man deliberately guilty of homicide is liable to the penalty of *qisas*, that is of death. But the Shariah reserves the right to *qisas* for the heir or guardian of the victim. Says Allah:

> "Whoso is slain wrongfully, we have given power unto his heir, but let him not commit excess in slaying." (13:33)

When the heir of the victim does the act of homicide, he

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> "Whoso is slain wrongfully, we have given power unto his heir, but let him not commit excess in slaying." (13:33)

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does a lawful act, which is unlawful for all the other people. The victim's heir realizes two objects of the Shariah: Slaying the murderer in retaliation and translating into action the injunction of carrying out the penalty of *qisas* by the hand of the victims heir.

Infliction of injury is also forbidden to all the people. But if a patient's life and relief hinges upon surgical operation, then, it is lawful for the doctor to perform surgery on him so that he may be relieved of pain. "Needs make lawful what is forbidden." The Shariah itself persuades an ailing man to be treated and commands him not to endanger his life. Operation by the surgeon fulfills a need and treats the wound received by the patient and thus his life is saved. All these acts are instrumental in the achievement of the objects of Shariah.

Beating is an act forbidden for all the people. But to bring up children properly and inculcate discipline in them it is necessary to reproach and if needs be to beat them. The Shariah enjoins to bring up children by providing them good training and education, so also does it allow those responsible for their upbringing to beat them for achievement of the purpose.

In short the nature of certain matters, the social and individual interests and the realization of the ends of Shariah demand that some individual should be exceptionally allowed to do those acts which are unlawful for the people in general.

Now, as a forbidden act is exceptionally made lawful for a particular individual for the realization of a definite purpose it is therefore incumbent upon that individual to do it to the extent of achieving the determined object. If his act fulfils some purpose other than the one that warrants it, the act in question would become an offence. For instance, if a doctor performs operation on a patient for the purpose of treating him, it is not only warrantable but is obligatory for him. But if the operation is designed to kill the patient then the doctor is to be treated as a killer and his operation as a crime.

(330) Right and Duty

According to the principles of the Shariah the person having a right is free either to exercise or not to exercise it. If he chooses

to exercise it, he will be at no fault and if he prefers to relinquish it, he will be committing no sin. In other words a right is that whose exercise is lawful and whose relinquishment incurs no penalty.

As opposed to right we have duty. The two are different by nature. If right legitimatize an act, duty makes it obligatory. If the person enjoying a right relinquishes his right, he will not be a sinner. But if the person on whom a duty is imposed abandons his duty, he will be a sinner and will have to undergo the prescribed punishment for it.

Although right and duty are specifically different, yet from the viewpoint of criminal law both are alike. An act done in exercise of a right or in discharge of a duty is lawful and does not constitute an offence.

Sometimes it happens that the same act which is the right of one person becomes the duty of another person. For example, slaying of the killer in retaliation by the heir of the victim himself is the heirs rights. But if the same act of slaying is assigned to the executioner, it becomes his duty. According to Imam Abu Hanifa admonition is the right of husband and the father, but admonition at the same time, is the duty of the teacher as well.

Right and duty are differentiated for two reasons. The first reason, whereon all the jurists are unanimous is that relinquishment of right entails no punishment whereas abandoning duty may be liable to punishment. The second reason on which the jurists differ is that the person exercising his right is always responsible for doing so with justification because he has the choice to exercise or forego his right. The person under the obligation to perform a duty, however, is not accountable for the legitimacy of the occasion on which he has to discharge it, for it is in all circumstances incumbent upon him to carry it out. This is the position of Imam Abu Hanifa and Imam Shafi'ee. But Imam Malik and Ahmed, on the contrary, hold that exercise of right, like the discharge of duty is not qualified by consideration of security inasmuch as within prescribed limits exercise of right is warrantable and a warrantable act incurs no liability.

In order to find out whether an act is right or duty we have to ascertain whether or not doing of such an act is obligatory

under the Shariah and whether or not omission thereof is sinful and punishable. It is obligatory and if the person omitting is an offender liable to punishment the act constitutes duty. But an act is the right of a person if he incurs no punishment by the commission or omission thereof.

Right is actually the superiority enjoyed by a person over his subject within a prescribed limit; for instance, the right to reform enjoyed by the reformer over the person say, wife, son or pupil subject to correction or reformation. Looked at from the same angle, a duty also involves superiority of the person under obligation over the subject of its discharge and the discharge thereof becomes his right. Thus according to the jurists who treat correction or reformation as a duty, the person on whom it is imposed assumes superiority over his subject in the same way as the person enjoying superiority over his son or pupil. In other words, the person on whom the discharge of a duty is obligatory is vested at the same time with a right over the subject of his duty, but he is disallowed to omit the exercise of such a right. This is the only difference between one possessing a right and one on whom a duty is imposed.

A consideration of the exercise of right and discharge of duty call for a detailed discussion of following questions:

(a) Legal Defence (b) Reformation (c) Medical Treatment (d) Manly sports. (e) Deprivation of Personal Security (f) Rights and Duties of Authorities.

(331) Legal Defences

Legal defence may be classified into two kinds:

(1) Special Legal Defence.

(2) General Legal Defence, that is inviting the people to do good and dissuading them from doing evil.

We now proceed to discuss them one by one.

Special Legal Defence or Defence Against Aggressor

(332) Special Legal Defence means to discharge one's duty by the use of proper force in order to undo a wrong for the sake of protecting one's own life and the life of others as well as exercise one's right to save one's own property and the property of others.

The purpose of special legal defence is to undo a wrong and such defence incurs no punishment for an act of defence as such does not stand in the way of passing sentence on the wrong-doer for the wrong done by him. The expression used by the jurists for special defence is defence against aggressor. The object of aggression is called the aggrieved party.

The divine decree as to the defence against the aggressor is as follows:

"And one who attacketh you, attack him in the like manner as he attacked you." (2:194)

Moreover, we have the following Tradition of the Holy Prophet to the same effect:

Y'ali bin Omayya narrates that a servant of his was involved in a brawl with someone. One of them took the hand of the other and hit it. The latter drew his hand from the mouth of his rival with the result that the two of the latter's teeth were extracted. He went to the Holy Prophet and complained to him. The Prophet declared his teeth deprived of the guarantee of security and said to the complainant, "Do you think that the man should have left his hand in your mouth to be bitten by you?"

Hazrat Abdullah bin 'Umar quotes the Prophet as saying:

"A person whose property is being grabbed wrongfully fights to save it and if slain dies a martyr."

There is yet another tradition narrated by Hazrat Abu Hurairah:

"If you throw a pebble at anyone who peeps into your house, hitting his eye, which is consequently lost, you will be committing no sin."

As the Shariah warrants defence of one's own life, property and honour against the aggressor, so also does it authorize the protection of life, property and honour of other than one's self against the onslaught of the aggressor:

"Help your brother whether he is a wrong-doer or is done wrong to"

Again, says the Prophet:

"The believers co-operate with each other to combat those causing corruption."

(333) The Legal Position of Defence Against Aggressor

The jurists are all agreed that defence against the aggressor has been made lawful so that an individual may be able to save not only his own life, property and honour but also those of some other person from being wronged. The jurists, however, differ as to the legal position of defence on two grounds:

(1) The nature of defence and the question whether defence is a duty which must be discharged in proportion as one has the power to do so or whether the act of defence is the right of the defender which he may or may not exercise.

The jurists are unanimous that in the case of attack on one's honour, defence is one's duty. For instance, if a man attempts to violate the chastity of a woman and the latter can defend herself only by killing the assailant then it will be her duty to kill him if she can; for letting the man overcome her is unlawful for the woman and if she does not offer resistance, the assailant is bound to get the better of her. Similarly, if a person sees someone committing adultery and he cannot prevent the culprit from it without killing him, he will be perfectly justified to kill him if possible.

Duty is that which requires denunciation of the person omitting it and to a certain degree his censure as laid down by the Shariah. Some jurists even maintain that the person omitting his duty incurs punishment, whether the punishment is temporal or supramundane.[1]

It may be that abandoning one's duty of defence is a case referred to above does not entail worldly punishment for want of criminal accountability, but the person omitting it is in any case a sinner and liable to punishment; because want of accountability for the omission of duty, does not affect the character of duty nor can it be forgiven under the Shariah.

Similarly absence of accountability for a duty does not place it at par with a right in as much as a right involves choice of doing or omitting an act; whereas duty does not involve choice. Besides, one who chooses not to exercise his right is no sinner, while the person omitting his duty commits a sin.[2]

1. (a) *Al Aamadi, Al Ahkam Fi Usoolil-Ahkam;* Vol. 1, 138.
   (b) *Al Ghazali, Al Mustasfa,* Vol. 1. p. 74.
2. *Al Ghazali, Al Mustasfa,* Vol.1, p. 74.

Jurists also differ on the question of the defence of life. The apparent position of Imam Abu Hanifa is in consonance with the view held by a majority of the Shafi'ite jurists. Defence of life according to this view, is duty.[1] But some of the jurists belonging to the schools of Imam Shafi'ee and Imam Malik are in agreement with the predominant view of the Hamblites, that is, defence of life is lawful but not obligatory.[2] These jurists cite the following tradition of the Holy Prophet in support of their position:

> "Remain in your homes and when you see the shining of swords cover up your faces."

There is another tradition to the same effect:

> "Be the murdered servants of Allah and not the murderer servants."

These jurists also quote the precedent of Hazrat Osman (R.A.A.) who did not fight the revolutionaries, although he knew that they were determined to take his life and if he chose he could have fought them.

Some of the Hamblites treat defence as absolutely lawful in a turmoil and absolute duty,[3] when there is no turmoil. The view held by some of the Shafi'ites and Malikites is identical with the above Hamblites.[4]

Most of the jurists treat defence of property as lawful but not as a duty. It is up to the person whose property is being forcefully taken away to defend or not to defend it. This discrimination between life and property means that if property is allowed to someone it becomes lawful for him. But the case of life is different. If one allows one's life to be taken, it does not become lawful. But some jurists are of the opinion that if

1. (a) *Hashia Ibn-e-Abideen.* Vol. 5, p. 48.
   (b) *Mawahib ul-Jaleel,* Vol.6, p. 323.
   (c) *Tuhfat-ul-Muhtaj* Vol.4, p 124.
   (d) *Al Tala'ee* and *Hashiat-ul-Shibli,* Vol.6, p.10.
2. *Al Mughni.* Vol.10, p. 350.
3. *Al Iqna,* Vol. IV, p.290.
4. (a) *Hashiat -ul-Ramali,* Vol.4, p.168.
   (b) *Asna-ul-Matalib,* Vol.4, p. 168.
   (c) *Sharh-ul-Zurqani Wa Hashiat-ul-Banani,* Vol. 8, p. 118.

property is animate or the defender is in possession of the property of someone who is barred from making use of his property or the property in question belongs to a trust or consists of something entrusted to the safe custody of the defender or belongs to the defender himself but is mortgaged or some other title like monoply(?) is involved therein, then defence assumes the character of duty.[1]

(2) Assault by Child, Lunatic and Animal

According to Imam Malik and Imam Shafi'ee if a child, lunatic or animal assults someone, the victim is in a state of defence. If it is not possible for him to save himself without killing the child, lunatic or animal in question, he will not incur any accountability, either criminal or civil, since he carries out his duty for saving his life.[2]

But Imam Abu Hanifa and his followers, with the exception of Imam Abu Yousuf, are of the opinion that the person assaulted will on civil grounds be under the obligation to pay *diyat* for the child, lunatic or animal killed by him. They argue that action in defence is allowed to deter an offence, but the act of a child, lunatic or animal is no crime. Hence there can be no lawful defence in the case of an assault by a child, lunatic or animal. Only the person assaulted is entitled to kill or wound the child or lunatic only when it is absolutely necessary. However, the rule is that *diyat* is not waived even in the case of inevitable necessity, although punishment may be remitted inasmuch as the security life and property have been guaranteed and no exercise of right on grounds of any Shariah provision comes into conflict with the security so guaranteed.

Imam Abu Yousuf, on the other hand, opines that only the price of the animal will be realized from the person attacked. As for a child or lunatic, his act does constitute an offence but for want of understanding his punishment becomes ineffective. As

1. *Asha ul Matalibi*, Vol., 4, p. 168.
2. (a) *Mawahib-ul-Jaleel*, Vol.6, p.223.
   (b) *Tabsirat-ul-Hukkam*, Vol. 2, p. 303.
   (c) *A 'lam*, Vol. 6, p.172.
   (d) *Muhazzab*, Vol. 2, 243.
   (e) *Al Igna*, Vol. 4, p.289.

opposed to a child or lunatic, the action of an irrational animal is no offence. From the position taken by Imam Abu Yousuf it may be inferred that in the case of an attack by a child or a lunatic the victim is in a state of warrantable defence but in the case of an attack by an animal he is under the pressure of absolute necessity.[1]

The jurists who acknowledge state of defence as warrantable in all circumstances argue that man is under the obligation to counter any aggression committed against his life or against the life of any other person. According to them it is a right of every man and often his duty to protect his own property or the property of others from the transgression perpetrated on it whether or not such an act of transgression is a crime. As a matter of fact, transgression does not in itself warrant the killing of aggressor, but it does make it lawful for the victim to deter the transgression and if this is not possible without killing the aggressor, then killing him is warrantable. In other words justification of deterrence (defence) warrants killing of the aggressor and not transgression itself. For this reason it is not necessary that transgression should be an offence.[2]

(334) Difference between Shariah and Man-made Law

The position of defence according to the Shariah has been dealt with. But its position under the man-made laws has been undergoing change in different periods of history. In ancient times the right of defence was considered to be a benefit derived from the law of nature rather than from man-made law. In the middle ages defence was treated as an action that did not inhibit punishment but did warrant remission of punishment. During the eighteenth century the defence came to be interpreted as a state of necessity which made it permissible for man to act in self-defence and such a state of necessity arises out of situation created by the absence of any support from the body-politic. In the nineteenth century, however, the concept of defence underwent further change and signified a state of compulsion; for in such a state the defender loses self control in the face of the danger looming before him

1. *Al Bahrul* Raiq, Vol.8, p.302.
2. *A'lam*, Vol. 6, p. 172 and 173.

and the instinct of self-preservation comes into play with the result that he acts on impulse. The objection raised to this concept is that it does not provide for the protection of the life and property, any person other than one's self and it leads to the conclusion that defence is warrantable apart from the exercise of right and discharge of duty.

The position of the modern laws vis-a-vis defence is that it constitutes a right whose exercise is permitted by the law and that to act in defence is also the discharge of one's duty because it is the right and even the duty of every man to protect his life and property. Besides, according to the laws in force today, punishment of the defender does not involve any interest of the society, for he is not the kind of criminal against whom the society has to be guarded.

From an examination of changing positions as to defence in different periods it appears that man-made law has at last reached in the twentieth century the stage from which the Islamic Shariah had begun in the seventh century. The Shariah in most of the circumstances treats defence as a duty while in some cases as a right. As opposed to it the man-made laws in force do not regard defence as a duty although they do concede to it the position of a right. It is possible that the scholars of modern law also construe and define defence as a duty at some later stage.

The pundits of modern law opine that the exercise of the right of defence vis-a-vis a lunatic or a child is warrantable, although both the lunatic and the child are exempt from punishment. The reason for this is that no punishment is incurred by a wrongful act committed in defence, as it is meant for deterring aggression. The position is identical with the view advocated by most of the jurists of Islam.

The scholars of modern law, however, differ on the problem arising out of the attack of an animal. The problem is whether lawful defence against the charge of an animal is a right or a state of necessity. Some of these experts advocate a view on this problem which is the same as is held by the *Hanafites,* that is an irrational animal cannot be regarded as a transgressor or criminal but necessity warrants its killing. Other pundits of the law, however,

believe in the concept of lawful defence against the charge of an animal as Imam Malik Imam Shafi'ee and Imam Ahmed do.[1]

The Egyptian law is in harmony with the view of Imam Abu Hanifa in that it lays down the condition that defence is lawful even if the aggressor's act is a crime. If it does not constitute a crime, defence is not lawful.[2]

(335) Condition of Defence against Aggressor

There are certain conditions for defence against the aggressor:

(1) Presence of lawlessness and transgression.
(2) Wrong is actually done.
(3) It is not possible to deter the wrong in question otherwise.
(4) The quantum force used to deter the wrong should be commensurate with the need to do so.

(1) First condition, that is, Presence of Transgression.

It is necessary that the act to which the victim is being subjected should be transgression. If it does not constitute transgression, defence against it is not allowed; for instance, the father, the husband and the teacher beats his son, wife and pupil respectively for the purpose of correction or the executioner beheads the man who is sentenced to death by decapitation or cuts off the hand of the man who is condemned to the amputation of hand or the person entitled to retaliation carries out the sentence of *qisas* or the amputation of hand. In all such cases the act done by the agent is neither violation of law nor transgression (Itida). Rather all the acts referred to in the above examples constitute either exercise of right or discharge of duty.

The result of laying down the condition of transgression and lawlessness is that doing of an act warrantable or obligatory under the Shariah by the person entitled to do it will not be treated as transgression; as for examples, to apprehend, search, flog or imprison. The reason for this is that all such acts comprise rights and duties of competent agencies.

No limit of transgression has been fixed and, therefore, we are not in a position to say that such and such act of transgression

1. *Al Mausooat-ul-Janaia,* Vol. 1, p. 525.
2. The reader is referred to Article No. 246 of the Egyptian penal law.

is serious and such and such act is minor, when even a minor transgression does not inhibit defence, although the defender is restricted by the condition that he should act in defence with the force which is indispensable for the purpose.

Transgression may be committed against the victim's own life, property and honour as well as against the life, property and honour of a someone else. Similarly the aggressor may do wrong to himself and his own property; for example, a person may make an attempt on his own life or attempt to amputate his limb or destroy his property.[1]

According to Imam Malik, Shafi'ee and Ahmed, transgression may not necessarily be a punishable offence. It is enough that the act is illegal. Besides these jurists do not consider it necessary that the aggressor should be criminally accountable; for the aggressor may be a lunatic or a child. It is enough that the act of the aggressor in any condition of defence is illegal. Imam Abu Hanifa and his followers, on the contrary, impose the condition that the act of transgression should constitute a punishable offence and the aggressor should be one who is accountable on criminal grounds. But Imam Abu Yousuf does not subscribe to this view. He says that only the act of transgression should be a crime and that the aggressor may not necessarily be a person who is amenable to criminal accountability. The position of Imam Abu Yousuf is in consonance with the provision of the Egyptian law which requires that the act of transgression must constitute an offence.

Imam Malik, Shafi'ee and Ahmed treat also the charge of an animal as transgression whereas according to Imam Abu Hanifa and his followers, the charge of an animal does not warrant provision for defence, because it does not constitute an offence. Deterrence of the attack of an animal is rather grounded in necessity. This view is also more or less in accord with the provision of Egyptian law which treats killing of an animal without legal requirement as punishable (Article 355 of Egyptian Penal Law) provided that requirement in this connection is taken to mean necessity, as most of the jurists take it. The reason for this is that what an animal does is no crime. However, if in any case the act of the

1. *Asna-ul-Malalib*, Vol. 4, p. 167.

owner of the animal can be deemed an offence, then condition for defence would be present. In any other case such a condition simply does not exist.

The aggressor is disallowed to counter the defensive act of the victim on the ground that he is acting in self-defence, because it is he who originally commits transgression and is, therefore, the object of the defensive action of the victim. Now defence requires that aggressor should be murdered, then his life is deprived of the guarantee of security and the victim acting in self-defence is innocent. Again if defence requires to injure the aggressor in order to disable him, then the injury so inflicted on him will incur no blame and the victim acting in self-defence will likewise be innocent. A precedent of this is the verdict of Hazrat Ali (R.A.A.) in the case of a woman. She hid her paramour on the wedding night in her bedroom. When her husband entered the room, the paramour assaulted him but the husband killed the paramour, whereupon the bride killed her husband. Hazrat Ali (R.A.A.) gave the verdict that she was guilty of killing her husband and accordingly sentenced her to death. The Caliph did not take into consideration the plea that she acted in her own defence or in the defence of someone else.

But if action taken in defence is in excess of that which is indispensable to deter transgression, the excessive action will in itself be deemed transgression and the aggressor will be entitled to defend himself and deserves to be requited for the excess committed against him by the victim acting in defence and the latter will be liable to punishment.

It is not necessary that transgression should be in progress for the existence of the state of defence, because the would be victim cannot wait for the aggressor to attack. He will rather be the first to act in order to deter the offence of the aggressor. If it appears that the aggressor is going to attack, as, for example, someone armed with weapons of aggression confronts the aggrieved person, the probability of his intended transgression will be determined by the conjecture of the latter. If he surmises that the aggressor is going to attack him although he may not have done so as yet, it will be presumed that he would strike the aggrieved person. But if the aggrieved person thinks that the aggressor will

not strike him[1], then it will be taken for granted that he will not do so. But, it is necessary that the conjecture of the aggrieved person should be of the highest order of probability so that it may warrant action in self defence. If his conjecture consists of a mere notion of being attacked, there will be no justification for defence. Suppose, for example, an armed person enters into the house of another person, and the occupant of the house has congent reasons to believe that the man in all probability means to kill him. The occupant of the house may, by acting first, kill him. The resident of the house may act in the same way if a thief breaks into his premises. If he has convincing reasons to believe that the thief will assault him he will be within his rights to kill him in self-defence with impunity.

First Condition

If a weapon is pointed towards someone for fun, such a person is neither in a state of self-defence nor is he a victim, for pointing a weapon or unsheathing a sword is no transgression. But if circumstances of the case indicated that the assailant just pretends to be making fun but actually intends to overcome the victim and assault him, then the person in question may act in self defence and may even kill the suspected assailant if there is no other course left for him. It is vital to ascertain the beginning and end of transgression, for defence begins with the beginning of transgression and ends with the end thereof. There can be no defence before the beginning and after the end of transgression. Suppose the victim strikes the aggressor and he turns his back or wounds him disabling him to continue his act of transgression; In a situation like this there is no justification for the victim to chase the aggressor in order to strike him once again or attack him if he is disabled to proceed with his act of transgression. If the victim pursues him or attacks him again his act of wounding or killing the aggressor would be tantamount to transgression for which he will be liable to punishment. However, the aggrieved person will be within his rights to chase the aggressor in order to take back his property with which he may have got away. His

1. *Alam, Vol. 6, p.27.*

state of defence would persist until he takes back his stolen property. If it is not to get back the stated property the aggrieved person may kill the thief.

State of defence does not arise from a mere wish of the aggressor to transgress. It arises only when there is a possibility of transgression. Thus a person who intends to do a wrongful act but is incapable of doing so is no aggressor. Striking, wounding or killing him is a crime, for the purpose of defence is to deter transgression. In the case of the man just referred to transgression is not possible at all.

Second Condition

The state of defence arises only when transgression is actually committed. If the process of transgression does not exist in practice, the aggrieved person's act does not constitute defence. It is, on the contrary, transgression itself, for the state of defence does not arise until transgression is not actually or probably in progress. It gives rise to the state of defence only when it is actually in progress. For this reason any transgression to be committed in future cannot give rise to the state of defence in the present. Similarly any intimidation to commit transgression does not occasion any act of defence, because it does not pose an impending danger to be countered immediately. Even if an intimidation is treated is transgression, there are various appropriate methods to deter it. Lodging a report with a law-enforcing agency; for instance, is proper measure to guard against the threat.

Third Condition

When it is not possible to act in defence by any other method. Another condition of the existence of the state defence is that no other possible method is present to guard against the aggressor. If there is any method other than counter attack can be adopted to deal with the aggressor. It is incumbent upon the aggrieved person to adopt it. If he does not do so and counter attacks the aggressor, he will himself be deemed a transgressor. For instance, if it is possible to call the people to help by raising hue and cry and thus deter the aggressor's attack, it will be improper for the victim to strike wound or kill the aggressor. If

he does so he would be guilty of a criminal act.[1] It is not warrantable for an aggrieved person to resort to violence, if he could get the help of the police in time, or could defend himself without adopting any violent method or with the support of anything available.[2]

The jurists differ on the question whether taking to flight is a mode of defence or not. The jurists who do consider it a way of defence treat flight as obligatory; for it is proper mode of defending one's self and it is incumbent on the victim to adopt a simple a possible mode of defending himself.[3] But the group of jurists that does not acknowledge flight as a mode of defence do not regard it as obligatory for the victim. They say that if there is no course open other than flight and action in defence the victim should counterattack the aggressor.[4] Some of the jurists, however, divide flight into proper and improper escape. In the case of proper or commendable escape, they consider it obligatory for the person who is being attacked. In the case of improper escape, flight according to them., is not obligatory.[5] At any rate the jurists who acknowledge flight as a form of defence consider it obligatory only when it fulfils the need of defence. If he has to defend his property or the honour of his family, which he cannot take with him, flight is neither a mode of defence, nor is it incumbent upon the victim.[6]

Fourth Condition

Use of force commensurate with the exigency of countering transgression.

One more condition of defence is to act in defence with a force proportional to indispensable need. If the force used exceeds the limit of indispensability, such an act would cease to be defence and assumes the character of transgression itself. In short, the person who is being wronged is bound to resort to defence in the lowest measure. If an attack can be deterred by a simple means,

1. *Hashia Ibn-e-Abideen*, Vol. 5, p. 482.
2. (a) *A'lam*, Vol. 6, p. 27.
3. *Al Mughni*, Vol. 10, p. 353.
4. (a) *Al Mughni*, Vol.2, p. 353.
5. *Tuhfat- ul-Muhtaj*, Vol. 4, p.126.
6. (a) *Ibid* Vol.4, p.126.

(a) *Asna-ul-Matalib*, Vol. 4, p. 167.
(b) *Asna-ul-Mutalib*, Vol. 4, p. 167.
(b) *A'lam*, Vol. 6, p.28.
(b) *Asna-ul-Matalib* Vol.4, p.160.

resorting to violence is not warrantable. For instance it is forbidden to subject a tresspasser to violence if he would leave one's premises when ordered or threatened. But if he does not leave the premises, he should be beaten only to an extent that is absolutely essential to force him out of the house. The reason for this precaution is that main aim of action against the transgressor is defence. if that can be achieved with a relatively mild measure then strong measure would be uncalled for. Thus if he can be turned out with the use of stick, it would be needless to use anything made of iron, for iron is a weapon of murder. If the aggressor turns his back, it is disallowed to chase him. Similarly, when the aggressor receives a grievous injury at the hands of the defender and is no longer able to proceed with his wrongful act, it will be unwarrantable to subject him to further violence, because the transgression committed by him is done away with. Suppose, for example, that the defender cuts off the hand of the aggressor and latter is repulsed and is about to flee. But the defender cuts off his leg, too. In such an event amputation of leg would incur *qisas* or *diyat* in as-much-as when the leg was being cut off, violence in defence was no longer permissible.[1] But if the aggressor could not be deterred without being killed or if it is feared that he would take the initiative and murder the victim if the latter does not kill him, then the victim may kill the aggressor or cut off his limbs. The part of the aggressor's body lost in such an action would be treated as insecure whose amputation is necessitated by the exigency of deterring a wrongful act.[2]

Possible measure in defence may be taken in the event of a wilful attempt on one's life or attack on one's family and property. If defence is possible by raising hue and cry in order to call the people for help, such a mode of defence should preferably be adopted instead of using hands in defence. But if no help is forthcoming and attack can be deterred by the use of hands, then it is warrantable to use one's hands. However, if defence is not possible with hands, then a club may be used. If a club does not serve the purpose use of weapons should be resorted to. Again, if the purpose of defence cannot be served by sparing the limbs

1. *Al Mughni*, Vol.10, p. 351-352.
2. *Al Mughni*, Vol.10, p.351-352.

of the aggressor, then his hands or legs may be cut off. And if killing the aggressor is indispensable, he may legitimately be killed. But if defence is possible with a club and the defender nevertheless amputates the limbs of the aggressor, he will have to pay indemnity for the loss of the limbs[1]; for this transgression is not based on any right and is similar to one committed in the absence of the state of defence. If the aggressor intends to transgress but turns back of his own accord, he should not be stopped. If he is disable by one blow, then a second blow should not be inflicted, since the purpose of action against him is to prevent the harm he intends to do and this purpose is fulfillled with a single blow.

Again, if a person bites another person's arm, the latter may break his jaw. If the culprit does not desist, the victim may do him more harm in defence with impunity.

If a man criminally assaults a woman and the woman kills him in self-defence, she will not be liable to punishment. There is a verdict of Hazrat 'Umar in this regard. A man criminally assaulted a woman who stoned him to death in self-defence. Hazrat 'Umar passed the judgment that no *diyat* is incurred by the murder of the aggressor in question.

A person attacked by an animal must act to defend himself as-much-as is required to deter the attack. If it is absolutely essential to kill the animal, it may be killed. The person involved will not be accountable for his action. The Hanafites however, hold that the person in question will be accountable on civil grounds. They argue that in such a case the basis of defence is necessity, which does invalidate criminal accountability rather than civil responsibility.

If a person peeps into the house of another person through a hole or a crevice in the door without permission, the owner of the house may ask him to desist from such an act. But if the person persists in this nefarious act, the owner may adopt any simple measure to prevent him from peeping into the house. But if this measure also fails, then the owner would be within his rights to burst the eye of the offender. There is complete agreement

1. The Jurists of Islam construe the expression Jaza (requittal) as Dhiman (indemnity). Dhiman may be incurred in the form of corporal punishment or in that of monetary or material compensation.

between the Shafi'ee and Hanbali Schools on this point.[1] They cite the following tradition of the Holy Prophet to substantiate their position.

> "If anyone peeps into your house without your permission, you may throw a pebble and break his eye without incurring punishment."
>
> Besides, Suhail bin Sa'd narrates that a man peeped into the Prophet's house through a hole in the door. The Holy Prophet happened to be tousling his hair with an iron comb. He later said to the man "Had I known that you were looking at me I would have thrown a lance at your eye. It is because of the eye that obtaining permission before entering the house has been enjoined."

Apart from the traditions cited above, the position of the Shafi'tes and Hanblites is in consonance with the principles of defence. Some of the Hanafites and a minority of other schools also subscribe to this view, while a majority of the Hanafites hold that it is not warrantable to break the eye of the offender for simply peeping into the house; for even looking at the private part of a person does not warrant breaking the eye of the offender, not to speak of seeing by peeping into his house. The Hanafites interpret the above tradition as designed to make admonition more severe for peeping without permission.[2] The Malikites on the other hand opine that the purpose of throwing a lance is to warn in defence and not to harm the wrongdoer and deprive him of his eye. For this reason, they say, if anyone throws a lance with the intention of piercing it into his eye, the defender would be liable to retaliation. If he means to warn the wrongdoer but inadvertently deprives him of his eye, then he will be accountable for it as inadvertently guilty and as a deliberate transgressor.[3]

Alauddin Kasani maintains that as a general rule the life of person is not insecure merely by virtue of his intention to kill someone. If the victim can defend himself by adopting a method other than taking the life of the aggressor, this latter course is not warrantable. But in case, there is no other alternative but to

1. *Al Mughni.* Vol. 10, p. 255 *Al Muhazzab* Vol. 2, p.242.
2. *Hashia Ibn-e Abideen,* Vol.5, p.485.
3. *Mawahib-ul-Jaleel,* Vol.6, p.322-323.

kill the aggressor in self-defence, he is allowed to kill him because that would be the defensive necessity.

If the aggressor unsheathes his sword to attack the victim, the latter may kill him acting in self-defence, for that is the only way of defence. If he calls the people for help instead, the aggressor would kill him before the help is extended because he has in hand an unsheathed sword. Hence killing the aggressor is necessity and is therefore, justified. Thus if the aggrieved person kills the aggressor he will not be accountable for homicide.[1]

If the aggrieved person attacks the aggressor in defence without waiting for the latter to attack him, he will do no wrong, provided that the situation indicates that the aggressor is going to commit transgression. If he could be overcome with a club which is, however, not available at the moment and the aggrieved person gets hold of a knife or sword to defend himself as it is the only means to deal with the aggressor he will be justified to use any weapon to save himself. He is not to blame for not having a club on hand.[2]

The aggrieved person is disallowed to be the first to act with the intention of killing or wounding the aggressor, unless he is sure that defensive action against him is not possible without doing so and that the use of such a force in defence is indispensable. The test of making sure of the measure of indispensable force is the inclination of the defender himself based on cogent grounds. But such a test though helpful in determining the indispensable force required in self-defence, will not be used as measure of the damage caused in effect or intended to be caused by the aggressor. The only course open to the defender is that he should adopt the method which he is inclined to think for cogent reasons requires the least force.

It is noteworthy that in the case of scuffle the test indicated above would not work, particularly when the aggressor comprises a group; for one member of the group may be dealt with in a manner which may not be effective in dealing with another. In fact, the same mode of defence against the entire group poses a threat to the life of the aggrieved person.[3]

1. *Bada'e-wal-Sanae'*, Vol.7, p.93. 2. *Asna-ul-Matalib.* Vol.4, p.167.
3. *Sharh-ul-Zurqani and Hashiat-ul-Banani,* Vol.8, p.118.

In such a case all the factors have to be taken into account in the assessment of the requisite force indispensable for defence.

(336) Exceeding the Limits of Defence

If the defender uses force in deterring transgression in excess of what is absolutely essential, he will be responsible for the use of excessive force disallowed by the law. For instance, the aggressor could have been prevented from aggression by threat, but the defender inflicts a blow on him. The latter would, therefore, be accountable for the blow.

Similarly, if the defender wounds the aggressor who could have been stopped with the hands, he will have to account for the injury caused by him, Again, the defender will be accountable for murder if he kills the aggressor who can be forced to desist from transgression by only injuring him. In the same way if aggressor takes to flight after being injured but the defender chases him and wounds him once more he would be accountable for inflicting the second wound. In short, the defender will be accountable for any act he commits unnecessarily so deter the attack of the aggressor.

Transgression and defence are corelated. No sooner transgression begins than the state of defence would obtain and when transgression ends the state of defence would correspondingly cease to obtain. Any act done by the aggrieved person after the end of transgression would entail accountability on his part. But transgression would not be deemed to have come to an end in case if the aggressor gets away with the property of the aggrieved person. In such a case the latter may chase him and recover his property. He may also use as much force as is necessary to snatch away the property from him. If it is not possible to recover the property without killing the aggressor the aggrieved will be within his rights to do so.[1]

The rule is that acts done in defence are justified and incur no punishment. But if the defensive acts of the aggrieved person pass on to a person other than the aggressor and such a person receives injury in consequence of any of those acts, then the harmful act which may be deemed the result of the defenders negligence or mistake will not be treated as lawful. For instance,

1. *Hashia Ibn- Abideen,* Vol. 5, p.274.

if the defender strikes the aggressor, and the instrument with which he does so hits someone else who is consequently injured or killed, the defender would be accountable as inadvertently guilty of inflicting injury or of murder, although he does intend to commit the act as he is within his right to strike the aggressor. This bears analogy to the case of a person who tries to hunt an animal but inadvertently kills man. Here the act of hunting is lawful but the hunter would be accountable as guilty of unintentional homicide.

According to three Imams Abu Hanifa, Shafi'ee and Ahmed it is permissible[1] to place snares or lay nets and thorns before the door of one's premises and around the walls thereof for the purpose of smiting the aggressor and the owner of the house will not incur any blame inasmuch as such a measure relates to self-defence. Besides, the trespasser is wounded because of his own wrongful act, inasmuch he tries to enter into the premises of another person without having the right of entrance. Imam Malik,[2] on the contrary, holds that if laying of thorns and similar things are meant for wounding or smiting the trespasser, then the owner of the house would be held for injuring the trespasser. However, if such a measure is designed to fulfil a requirement of the premises, the owner will not be accountable. The opinion of Imam Malik is, perhaps, closer to the principles of defence, for the essence of defence is to deter transgression in the simplest possible manner. Sometimes it is enough to inflict a slight injury on the transgressor to prevent him from his wrongful act but sometimes he will have to be killed.

The pundits of modern law also discuss the same problem. Some of them construe it as defence, while others do not. However, when a case of this nature was preferred in a French court, it regarded the act of laying thorns etc as act of lawful defence and exculpated the owner of the House.[3]

1. (a) *Hashia Ibne- Abideen* Vol.5, p. 524.
   (b) *Tuhfat-ul-Muhtaj*, Vol.4, p.50.
   (c) *Al Mughni*, Vol.9, p.571.
2. (a) *Tabsirat-ul-Hukkam*, Vol.2, p.296.
   (b) *Mawahib-ul-Jaleel*, Vol.6 p.241.
3. *Al Qismul A'am, Le Ahmed Bek Safwat*, p.224.

(337) Assailant's Right of Defence

If the aggrieved person exceeds the limits of rightful defence the assailant himself passes into a state of self-defence, since the act of the aggrieved person in such a case assumes the character of transgression and the state of defence, as we know stems out of transgression. But if the aggrieved person remains within the lawful limits of defence in dealing with the aggressor, the latter would continue to be the transgressor and his claim of self-defence will not be acknowledged. On the other hand if the aggrieved person over-steps the rightful limits in his act of self-defence, then his act will be treated as transgression and the aggressor would be within his rights to deter such a wrongful defensive action.

(338) Provision as to Defence against Aggressor

According to the jurists, all defensive acts are lawful and the defender incures no criminal liability for such acts. This is because defence is no crime. Such acts incur no civil accountability either, for the defender exercises his legal right or discharges the duty imposed upon him by the law. Obviously he incurs no accountability for the exercise of his right or the discharge of his duty. But if an aggrieved person's action in defence exceeds the lawful limits it would be a crime and he would consequently be accountable on criminal and civil grounds.

As we have already mentioned, the defender who kills a lunatic, a child or animal would, according to Imam Abu Hanifa, be criminally accountable. But Imam Abu Yousuf holds that he would be accountable on civil grounds for killing an animal only. But these views, however, are at variance with that advocated by the majority of jurists.

(339) Shariah vis-a-vis Man-made Law

There is not much difference between the provisions of the modern laws and views advocated by the pundits of these laws with regard to defence against the transgression of aggressor and the relevant provision of the Islamic Shariah. In fact, the grounds and conditions of defence laid down by the Shariah and the modern laws are identical. So it is the case, in particular, with the provisions

contained in the Egyptian and French laws when they are compared with those of the Shariah. Again, the views of the modern legal experts in respect of the flight of the defender bear close affinity to those of the jurists of Islam which have been discussed above. For instance, some of the pundits of the modern law regard flight as a desirable mode of defence; while others do not. There are still a few others who think that in case flight is not improper, it is incumbent upon the defender to betake himself to flight and the other way about. The provision of modern law in relation to defence is identical with that of the Shariah. Thus the modern law pundits deem defensive act permissible when defensive situation arises and opine that the defender is not amenable to accountability, criminal or civil.

B. General Defence under the Shariah

Viz:

To Enjoin the Right and Forbid the Wrong

(340) The Obligation to enjoin the right and forbid the wrong owes its origin to the following verses of the Holy Quran:

"And there may spring from you a party who invite to goodness and enjoin right conduct and forbid wrong conduct. Such are they who are successful". (3:104)

"They are not all alike. Of the people of the scripture there is a staunch community who recite the revelations of Allah at right, falling prostrate. They believe in Allah and the Last Day and enjoin right conduct and forbid the wrong, and vie with one another in good works. They are of the righteous." (3:113-114)

"And the believers, men and women, are protecting friends of one another. They enjoin the right and forbid the wrong, and they establish worship." (9: 71)

"Those of the Children of Israel who went astray were cursed by the tongue of David, and of Jesus, son of Mary. That was because they rebelled and used to transgress. They restrained not one another from the wickedness they did. Verily evil was that they used to do." (5:78-79)

Ye are the best community that has been raised up for mankind. Ye enjoin right conduct and forbid indecency." (3:110)

"Those, who, if We give them power in the land establish worship and pay the poor-due and enjoin kindness and forbid inquity." (22:41)

"Help one another unto righteousness and pious duty. Help not one another unto sin and transgression." (5:2)

There is no good in much of their secret conferences, save in him who enjoineth almsgiving and kindness and peace-making among the people. Whoso doeth that, seeking the good pleasure of Allah, We shall bestow on him a vast reward." (4:114)

"If two parties of believers fall to fighting-then make peace between them. If one party of them doeth wrong to the other, fight ye that which doeth wrong till it returns unto the ordinance of Allah." (XLIX:9)

The meanings of the above verses are verified by the saying of the Holy Prophet.

Hazrat Abu Bakr (R.A.A.) said in one of his sermons:

"O People :You cite the following verse of the Holy Quran and misinterpret it:

O ye who believe! Ye have charge of your own souls. He who erreth cannot injure you if ye are rightly guided.

"I have on the contrary heard the Prophet say: "If a nation indulging in sins has group that can prevent the people from doing evil but does not do so, it may be that Allah punishes the entire nation."

'Hazrat Abu Tha'lba Khashani narrates that he asked the Holy Prophet the meaning of the above verse of the Holy Quran.

The Prophet replied: Abu Tha'lba, keep up enjoining the right conduct and forbidding the wrong. When you see that the people have become greedy and the slaves of their desires, preferring the world to the life in the Hereafter and each individual among them is proud of his own opinion, you had better try to reform your own inner self, and leave the people to themselves".

There is another Tradition which runs as follows:

"Do continue to enjoin good and forbid iniquity; Otherwise,

God Almighty would impose the worst people upon you. Then nobody would listen to your righteous men when they would invite to goodness."

Again,

"All the goods as compared to the war in the way of Allah are like the foam as compared to fathomless ocean and all the good deeds as well as war in the way of Allah as compared to enjoining. The right conduct and forbidding the wrong are like the foam as compared to the ocean."

There is yet another Tradition of the Holy Prophet:

"Refrain from sitting on the roadside" said the Prophet.

"The people said, "But that is necessary for us. We sit there and talk."

"Then you should conform to the right of the way." Observed the Prophet."

"What is the right of the way?" They enquired.

"Keep the eyes downcast, remove nuisance, if anyone greets you greet him in return and enjoin goodness and forbid iniquity."

Hazrat Abu Obaida bin Jarrah (R.A.A.) narrates,

"I asked the Holy Prophet who would be the most virtuous person with Allah. The Prophet replied, "The one who invited the ruler to goodness and forbade him iniquity, whereupon the ruler slew him; even if he was not slain, all his misdeeds would be condoned as long as he lived thereafter."

Hazrat Hasan Basri has handed down another Tradition to the same effect:

"The Prophet has said: The martyr of the highest order in the Ummah is one who enjoins good conduct on the ruler and forbids him the wrong whereupon the ruler kills him. Such a martyr will have a place in Paradise between Hamza and Jafar."

Again, according to Hazrat 'Umar (R.A.A.) the Prophet said:

"The nation which does not enjoin justice is very vile and the nation which does not enjoin goodness and forbid wrong conduct is very vile."

Hazrat Abu Saeed Khadri quotes the Holy Prophet as saying, "If anyone of you sees an evil and can weed it out with his own hand he ought to weed it out. If he can't do this with his hand, he ought to verbally forbid the people doing it. If he is not in a position to prohibit it verbally, then he ought to abhor it in his heart of hearts. This is the lowest degree of faith."

(341) The Nature of Enjoining the Right and Forbidding the Wrong

The right (Maroof) constitutes every act which is proper and obligatory under the provisions and principles of and consistent with the spirit of the Shariah; for instance inculcating in one's self cardinal virtues forgiving the enemy in spite of the power to overcome him, making peace between two persons fighting with each other; preferring the Hereafter to this world, meting out kind treatment to the poor and the needy, building asylums and hospitals, helping the aggrieved person, treating parties equally in hearing and deciding a case, inviting the people to consul, accepting collective decision and implementing it and spending public funds on public works etc.

The wrong may be defined as every criminal act which the Shariah declares unlawful, whether committed by an obligated person or one who is under no obligation. Thus if anyone finds a lunatic or child drinking liquor, he is under the obligation to stop him or spill the liquor. Similarly, if anyone sees a male lunatic fornicating with a female lunatic or committing unnatural act on an animal, it is obligatory to stop him whether such a sin is committed openly or secretly.

Some jurists define the wrong as an act, the commission whereof is forbidden in the Shariah.[1] This interpretation of the word *'munkir'* is preferred to criminal act or M*a'siat* be-cause according to them *munkir* is more common than *masiat.* Moreover the jurists do not regard the act of a lunatic or child as criminal, inasmuch as no act is a crime unless the person doing it is an offender. For this reason the act of a lunatic or a child cannot be deemed a crime.

1. *Tafseer-e-Razi,* Vol.3. p.20.

Enjoining of the right is sometimes done by a word of mouth; for instance inviting the people to help the poor or to participate in a holy war. Sometimes the right conduct is enjoined by taking practical steps; as for example, providing financial aid to the needy or joining the ranks of the *mujahideen*. Sometimes the call to do good comprehends both word and deed. This is done when one participates in the holy war as well as invites others to join; or when one pays the poor-due one's self and invites others to do so at the same time.

Similarly, forbidding the wrong may be done sometimes by word and sometimes by deed; for instance, prohibition of drinking; or else, spilling the liquor or preventing drinking by force. If evil is prohibited verbally, it amounts to forbidding the wrong. If action is taken for the prevention of evil, it means weeding out the evil.

In other words, enjoining of the right means to persuade the people to say or do anything that is proper under the Shariah and forbidding the wrong means dissuading the people from doing anything improper according to the Shariah or the attempt to eradicate it.

(342) The Legal Aspect of Enjoining the Right and Forbidding the Wrong

The jurists are agreed that the function of enjoining good and forbidding evil does not simply constitute the right of the individuals which they may abandon or discharge at their sweet will. It is not merely a good deed either, that is, if it is done by the individuals well and good, and if it is not done, there is no harm. It is not, in fact, an obligation which ought to be fulfillled. Under the Shariah it is incumbent upon all the individuals of the society to perform the above function so that the social order might be grounded in moral good, the individuals are imbued with virtues as they grow and the incidences of crimes is reduced. Thus in an Islamic state the functionaries of Government, public institutions, the individuals, and all of them perform this function. In this way goodness takes root in social texture and rulers and the ruled, the high and the low cooperate in the eradication of evil from the society.

Although the jurists are unanimous on the obligatory character of the function of enjoining good and forbidding evil, yet they differ on the question of the limitation of this function in its two aspects. The first poses the question. What is the nature of this function? The second relates to the persons for whom this function is obligatory.

Difference on the Nature of Function

Some of the jurists declare that the function of enjoining good and forbidding evil is an imperative duty which is unquestionable and is imposed on every Muslim, who is to discharge it himself in proportion to as he is capable of, although there may be people in the society who enjoy greater power, have greater capacity and more leisure hours to perform it. These jurists deem the function in question equal to or mandatory even to a greater degree than *Hajj*. They are of the view that Shariah has laid the condition of necessary financial resources for the performance of *Hajj*, but no such condition has been laid down for discharging the duty of enjoining good and forbidding evil, for everyone is capable of performing it at any time. If a man is ignorant or illiterate he may invite the people to such overt acts as offering prayers and keeping fast or dissuade them from larceny or adultery and thus discharge the imperative function assigned to him by the Shariah. An educated person, on the hand, can perform the function in a wider sphere. He may not only invite the people to the overt act like prayer and fasting but also enjoining upon them such good acts as are unknown to the general run of the people. The jurists who treat the function of enjoining good and forbidding evil as an imperative duty maintain that its being imperative is a more effective means of safeguarding the Muslim Ummah from depravity and licence.[1]

Majority of the jurists are of the view that the moral function

1. (a) *Tafseer-al Manar*, Vol.4, p. 34-35.
   (b) *Al Jassas, Ahkam-ul-Quran*, Vol. 2, p.29.
2. (a) *Tafseer-ar-Razi*, Vol. 3, p.29. (b) *Al Zamkhashi, Kashaof*, Vol.1, p. 319.
   (c) *Ibn-ul-Arabi, Ahkam-ul-Quran* Vol. 1, p.128.
   (d) *Al Qurtubi, Al Ahkam-ul-Quran*, Vol.4, p.165.
   (e) *Al Jassas, Ahkam-ul-Quran* Vol.2 p.29 (f) *Asna-ul-Matalib*, Vol.4, p.129.
   (g) *Mawahib-ul-Jaleel*, Vol.3, p.348.

of persuasion and dissuasion is like *jihad,* a representable duty that is, although every Muslim is under the obligation to perform it, yet if some of them discharge it, the rest are relieved of it.[2] Their view is based on the following verse of the Holy Quran:

> "There should be a group among you to invite the people to goodness and enjoin the right conduct and forbid the wrong. Such are they who are successful." (3:104)

The word 'Min'[1] occurring in the above verse is designed to identify a few people to perform the exhortative function. What the Holy Quran, says is that some of the people should do the job and not everyone. This means that if a few people discharge the duty, the rest are exempt, that is, the duty is invalidated with respect to the rest of the people. Thus it is a representable or exclusive duty imposed on a few to the exclusion of all others.

Difference of Opinion on the Kind of People to Whom the Exhortative Function is Assigned

Majority of the jurists hold that enjoining of good and forbidding of evil is the duty of all the individuals of the Muslim Ummah, for Allah Says:

> "You are the best community that has been raised up for mankind. Ye enjoin right conduct and forbid wrong conduct." (3:110)

However, some of the jurists opine that the duty in question is imposed only on those, who are capable of discharging it (the *Ulema,* for instance). They argue that it is possible that an ignorant man persuades the people to do wrong and to abstain from good. Moreover, such a person is likely to be hard when it is expedient to be lenient and the other way about. It is also possible that his attempt to prevent a person from misdeeds intensifies his deviant activity. Again, a person performing the moral function of persuasion and dissuasion may be unfamiliar with the position of one school, while being acquainted with the standpoint of another school. The jurists advocating the view under discussion are those who treat the function of enjoining good and forbidding evil as an exclusive or represent able duty, which when discharged by a chosen few relieves all the other individuals of the obligation to

1. According to other jurists the word 'Min' is used to describe rather than classify.

exhort. This position is in complete harmony with the view which assigns the function of enjoining good and forbidding evil exclusively to the *Ulema.*

This view has been criticised on the ground that mere assignment of duty to some of the people does not invalidate it. It becomes void only when it is discharged by those people. If the *Ulema* do not discharge the function assigned to them, then it becomes incumbent upon the rest of *Ummah* to perform it. Besides the nature of all-inclusive duty assigned to a few people demands that it should be obligatory for all the people and that all of them should be responsible for it until some of the people discharge it. When it is discharged by them all others are relieved of it. Besides, if the moral function in question is assigned to even an ignorant person as a duty, the fears expressed above may not necessarily come true, for an ignorant person will persuade the people to do what is obviously right and to shun what is obviously wrong. He will for instance try to induce them to offer prayers and to engender hatred in them for theft and adultery.

(343) **Essential Conditions to be Fulfillled by the People Entrusted with the Moral Duty of Persuasion and Dissuasion**

It has already been said that most of the jurists treat the duty of enjoining good and forbidding evil as obligatory for all the individuals of the *Ummah* and do not confine it to any specific group *(Ulema).*

Nonetheless most of them have laid down certain conditions. Some of these condition relate to the nature of the function in question, while others relate to the general provisions of the Shariah.

The First Condition

Responsibility

It is essential that a person enjoining good and forbidding evil is perceptive and has the freedom of choice. If this function is treated as duty, it is all the more necessary that he is capable of understanding and enjoys the freedom of choice; for renunciation of duty incurs accountability and under the general principles of

the Shariah a person who is not obligated cannot be treated as accountable. The duty of persuasion and dissuasion therefore, is obligatory for a responsible individual.

But this does not mean that an unobligated person should not enjoin good and forbid evil as a good deed;[1] for an unobligated individual is capable of good deeds which he can do without being under the obligation to do them. No one can prevent him from doing good deeds either. He may himself, of course, refrain from doing them. For instance, fasting and praying of a minor are not obligatory, but if he keeps fast or offers prayer, such acts would constitute good deed for him and nobody is empowered to stop him from doing those acts. However, if the minor does not choose to do them, he will be guilty of no sin. Similarly, it is not-incumbent upon an unobligated person to enjoin good deeds and forbid misdeeds. He is free to choose either to perform this duty or not to perform it. Thus if a boy or girl who is nearing the age of puberty breaks the pots meant for the use of liquor, he or she would deserve reward in the Hereafter. Nobody has the right to stop him or her from doing it.

Second Condition

Faith

The person carrying out the duty of enjoining good deeds and forbidding bad ones is imposed upon the Muslim alone. The non-Muslim is not under the obligation to do so.[2]

This condition ensures complete freedom of belief for the non-Muslims and security against aught repugnant to their beliefs; for enjoining the good includes everything which the Shariah declares obligatory and desirable such as fasting, saying prayers, Hajj and belief in the unity of Allah, while dissuasion from evil includes all the beliefs and acts inconsistent with the Shariah such as belief in trinity, renunciation of Christ, a life of renunciation, use of liquor and eating of swine's flesh. If enjoining good and forbidding of evil is imposed upon the non-Muslim as a duty, then it would be incumbent upon him to adopt all those things, which the Muslim is under the obligation to adopt and shun all those things which the Muslim must shun; he will also be under

1. *Ahya-e-Uloom-u-ddin,* Vol.7, p.14. 2. *Ahya-e-Uloomuddin,* Vol.7, p.15.

the obligation to have all the beliefs of a Muslim and to profess the faith of Islam that is at odds with his own faith. This exactly is the sort of duress which the Shariah prohibits in the words:

"Religion admits of no coercion". In short the duty of enjoining good and forbidding evil is made by the Shariah obligatory for the Muslims to the exclusion of non-Muslims in consideration of the freedom of belief.

The Third Condition

The Power of Enjoining and Prohibiting

The third condition laid down for enjoining good and forbidding evil is the power to do so. The person performing this function should be powerful enough to root out evil; but one who does not possess such power is exempted from the duty of enjoining good and forbidding evil. He should rather content himself with harbouring dislike for crime and avoiding the man guilty of crime.

A Muslim is not absolved of the obligation of enjoining good and forbidding evil merely by his sense of incapability. Such a sense must be coupled with the danger of undergoing loss or suffering or with the possibility of provoking the offender to commit a greater offence. If a person knows that enjoining good and forbidding evil would produce no effect, and would rather arouse the people to subject him to violence, then the function of calling the people to goodness and urging upon them to shun evil would cease to be obligatory for him. Such a person should be contented with nourishing aversion for crime in his heart of hearts. He should avoid visiting places where crimes and sins are committed and shun the company of sinners and criminals. But if a Muslim knows that if he tries to prevent someone from doing something evil, the evil will be elemenated or at least will be replaced by a lesser evil, it will be incumbent upon him to forbid evil. But in case he fears that his attempt at the prevention of an evil would result in replacing it with another evil equally immoral, he may either make such an attempt or give up the idea of preventing it at his discretion. But if he thinks that his attempt at forbidding an evil would produce a greater evil he will not only be absolved of the obligation to forbid the evil, but also such an attempt

would not be permissible. For instance, a man has an impure drink and the person who wants to prevent him from the use thereof thinks that if he destroys it, the man will drink liquor instead and, therefore, such an action would not serve the purpose. Imam Ibn-e-Taymiah was once confronted with a similar situation. As he was passing by a group of Tartars, accompanied by his companions, he found them drinking liquor. The Imam's companions, wanted to prohibit them. But the Imam said that Allah had declared drinking of liquor unlawful because it made man give up prayers but with the Tartars it was different. When they drank wine they desisted for a while from killing the people, enslaving the children and doing the acts of violence and plundering. It was, therefore, advisable to let them indulge in drinking.[1] If anyone feels that his enjoining good and forbidding evil would not produce the desired result he will not be under the obligation to do so.[2] Nevertheless such an action on his part would be desirable in order to vindicate the ways of Islam and remind the people of them.[3] If anyone proposes to falsify evil by his action, but such an action at the same time poses the danger of an injury to himself, then he is absolved of the obligation of weeding out the evil, although the action would still be desirable.[4] For instance, a person may snatch away liquor from the drunkards and destroy it as well as break the pots used to drink it, but he is at the same time well-aware that those people would subject him to violence. In such a case the person is not under the obligation to prevent the evil of drinking, as such a deed would constitute a good act all the same.

Sense of incapability owing to the lack of knowledge is to be treated on the analogy of the feeling of incapability. Thus the duty of enjoining good and forbidding evil is imposed on a common Muslim only in matters of adultery, larceny and giving up prayers. He is not under the obligation to discharge this duty in matters whose significance and wisdom he is incapable to grasp. If the general run of people are entrusted with the task of enjoining

1. (a) *Ahya-e-Uloomuddin* Vol.2, p. 26. (b) *A'lam-ul-Moqieen* Vol.3, p.28.
   (c) *Majmoal-Rasail Al Hasbuha,* p.67 and 68.
2. *Ahya-e-Uloomuddin* Vol.2, Part 7, p. 26.
3. Some jurists are of the opinion that the obligation is not annulled. The reader is referred to *Asna-ul-Matalib.* Vol.4, p. 180.
4. *Ahya-e-Uloomuddin* Vol.2, Part 7, p. 26.

good and evil respectively in such matters also, it is likely to create turmoil rather than reform the people.[1]

To be absolved of the moral duty under discussion in the case of incapability, it is not necessary to establish such a state of incompetence beyond doubt. It is enough that the person in all probability considers himself to be incapable of performing the function; for in such cases probability is synonymous with knowledge and injunction. Thus if a person thinks that prohibition of a misdeed by him will produce no result he stands absolved of the duty of prohibition. Similarly if a person has strong reasons to fear that prohibition of a wrongful act would do him harm, he will not be under the obligation to perform the duty of forbidding evil. However, in the case of indecision and uncertainty, a person is not absolved of the responsibility of curbing evil.[2]

Fourth Condition

Justice

Some jurists also lay down the condition that the person performing the duty of enjoining good and forbidding evil should not himself be iniquitous. They cite the following verses of the Holy Quran in support of their view:

> "Enjoin ye righteousness upon mankind while ye yourselves forget to practice it?" (2: 44)
>
> "O ye who believe! why say ye that which you do not. It is most hateful in the sight of Allah that ye say that which ye do not." (LXI: 2-3)

According to the above jurists exhortation of others must be preceded by one's own edification. Reforming others in other words, is a stage that follows one's one moral improvement; for a person incapable of reforming himself would be the more incapable of reforming others.

But according to the predominant view of the jurists an iniquitous fellow has the right to enjoin good and forbid evil, that is a person performing this function should not necessarily he impeccable; for if such a condition is laid down. then the moral process of enjoining good and forbidding evil would come to a standstill. This is exactly the reason why Hazrat Saeed bin

1. (a) *Ahya-e-Uloomuddin,* Vol.2, Part 5, p.28. (b) *Tafseer-al-Manar,* Vol. 4, p. 34.
2. *Ahya-e-Uloomuddin,* Vol.2, Part 5 p.28 and 29.

Jubair has said that if only the man with an immaculate character is to discharge the duty or fostering good and preventing evil, no such person will be available to do accomplish the task.

An iniquitous person is he who has committed an offence or a sin or who has abandoned his duty. If an iniquitous person, as a rule, is restrained from performing the moral function in question, then abandoning of one duty would be obligatory as the result of renunciation of another and the commission of one unlawful act would necessitate the prohibition of another duty.

The two verses of the Holy Quran cited to substantiate the argument that a wicked or erring person is incompetent to perform the reformative duty do not mean that such a person is disallowed to perform it. They are simply designed to admonish the iniquitous person performing the reformative task for failing to practice himself what he preaches others and to warn him to desist from what he forbids others; whereas in the fitness of things one should prove his word by his own example so that his precepts may he effective and his exhortation may produce the desired effects.[1]

Fifth Condition

Permission

Some of the jurists qualify the discharge of reformative duty with the permission of the Imam or the competent authority. They argue that the Imam, in the first place, is empowered to appoint any individual to perform the function of enjoining good and forbidding evil. Secondly, unqualified permission for the performance of this function is likely to cause strife. But majority of the jurists are opposed to this view and do not consider it necessary to obtain permission of any group or individual for the performance of reformative function. Even if the Imam appoints a few people specially for the performance of the duty, there is no restriction on others to do it. The argument advanced by the majority of the jurists in favour of this position is that the relevant divine injunctions make it obligatory for every Muslim to discharge the reformative function and treat the person shirking from this duty is an offender and sinner and that according to them it is

1. *Ahya-e-Uloomuddin*, Vol. 2, Part 5, p. 15 and 17.
(a) *Al Kashif*, Vol. 1, p. 319. (b) *Ahkamul-Quran*, Vol. 2, p. 33

incumbent upon every Muslim to do all in his power to put an end to an evil wherever he finds it. Hence permission of the Imam is a groundless condition. What is more important is that the common individuals of the *Ummah* are allowed to enjoin the right conduct upon the Imam himself as well as forbid him the wrong conduct. In fact, they are under the obligation to do so. Well then, how could a person be competent to permit or prohibit reformative act who is himself open to exhortation and guidance?

The foregoing view held by a majority of the jurists had been in practice in all the periods of Islamic history.

It was operative even in those days when the Caliphs and the Governors specially assigned the reformative function to a certain class of people and this specific assignment did not impede the commoners to enjoin good and forbid evil. As a matter of fact they often exhorted the caliphs and governors themselves and were always on the lookout for a chance to eliminate evil; but the caliphs or the governors took no exception to it.[1]

The jurists who lay down the condition of obtaining permission for enjoining good and forbidding evil aim at the institutionalization of reformative activity. They do not mean that one who does not have permission to perform the reformative duty are totally prohibited to discharge it. Thus if a person who is not given the permission to enjoin good and forbid evil breaks the pots which he finds the drunkards using for drinking liquor and spill or destroys the liquor by spilling, or who finds that there is no way other than killing an adulterer to prevent him from fornication, he can not be indicated for committing a deterrent offence. The reason for this is that both the acts referred to are warranted by explicit divine injunctions. However, such a person may be liable to penal punishment for the violation of the Imam's order and his executive powers.

(344) Conditions of Reformative Activity

So far as the act of enjoining good or the right is concerned, there are no timings and conditions prescribed for it. It may be

1. (a) *Tafseer-ul-Manar*, Vol. 4, p.33 (b) *Ahya-e-Uloomuddin*, Vol.2, Part 7, p.19.
(c) *Al Jassas, Ahkam-ul-Quran*, Vol.2, p.33. (d) *Al Behr-ul-Raiq*, Vol. 5, p.45.
(e) *Asna-ul-Matalib*, Vol. 4, p.179. (f) *Mawahib-ul-Jaleel*, Vol.3, p. 348.
(g) *Al Kashaf*, Vol. 1,p. 319.

done on any occasion and at any time. But it is different with the deterrence and elimination of evil. There are certain essential conditions which ought to be invariably fulfillled in the performance of this function. They are as under:

(1) The wrong or evil is found out
(2) The wrong or evil actually exists
(3) The wrong or evil is evident and needs no investigation.
(4) The wrong or evil is to be prevented by the simplest method known to prevent it.

First Condition

(1) To fulfill the first condition it is necessary that the act which is being prevented and eliminated is evil or wrong. In other words, such an act. should be unlawful according to the Shariah and the occurrence whereof is prohibited whether the doer of it is obligated (responsible) or unobligated. Thus if a child or a lunatic is found drinking liquor it is incumbent upon the person witnessing it to destroy the drink and prevent ,the child or lunatic from drinking it. Similarly if a male lunatic happens to be committing adultery with a female lunatic, or entering into unnatural intercourse with an animal the eye witness is under the obligation to stop such an unlawful and heinous act. In the prevention of evil, minor and major offences are not to be discriminated. Hence to be stark naked in the bath room, sitting in private with an unrelated woman, or looking at female strangers are all wrong acts. Although they are minor sins, it is obligatory for Muslim to forbid and prevent them.[1]

However, the essential condition of forbidding anything evil is that the evil should be evident and does not need a new interpretation to be characterized as evil. If it is not obviously evil and require a new interpretation to be treated as evil, it cannot be the object of prohibition. For instance a Hanafite cannot prevent a Shafi'ite from eating the animals and Yajju lizard and badger. Similarly, the latter cannot stop a Hanafite from marrying without the consent of the guardian.[2]

1. *Ahya-e-Uloomuddin* Vol.2, Part 7 Page 35 and 36.
2. (a) *Ahya-e-Uloomuddin.* Vol.2, p.37 and 38.
   (b) *Asna-ul-Matalib,* Vol.4, p.180.

Second Condition

Existence of Evil in Actuality

This means that the evil or wrong which is being curbed or eliminated is present at the moment and the offender is busy indulging therein, as for example he is busy drinking or happens to be meeting a female stranger in private. If the offender has finished the wrongful act, the evil or wrong to be prevented has passed the stage of prohibition and elimination. It now enters the stage of punishment which falls within the jurisdiction of the competent authority. Individuals do not have the power of awarding punishment for an evil act already committed. If anyone injures tortures or reviles the offender after the commitment of an evil act, he will himself be guilty of an offence; whereas if he had done the same thing during the commitment of the evil or had his preventive acts been needed to prohibit the offender, they would have been reckoned as fulfillment of an obligation rather than an offence.

If a person is likely to commit an offence or sin, say, making arrangements for a drinking party by placing glasses and bottles on a table, he should simply be exhorted to desist from committing the sin. It will be an offence to be hard upon him or to revile and beat him. If the person in question says that he has no intention of drinking then even exhortation is undesirable; for exhortation in such a situation would be tantamount to call in question the integrity of a Muslim.

Third Condition

The Evil Act should be Too Obvious to Need any Investigation

Another condition laid down for the prevention and elimination of evil is that it is too obvious or evident enough to need any probe or enquiry. If investigation and detective activities are required to unearth an evil, then such measures are unwarrantable. Allah forbids them and enjoins:

"Spy not!" (49:12)

Moreover, the Shariah enjoins respect for the people and for the privacy of their homes. It is not permissible to violate

this respectability before the evil is evident. Again, the Holy Prophet has prohibited to probe into the secret affairs of the people. He is reported to have said to Hazrat Mo'awia: "If you try to probe into the secrets of the people, you will spoil them and cause disruption among them."

There is yet another Tradition to the same effect

"O People! who have professed the Islamic faith verbally but have not accepted it in all sincerity, do not speak ill of the Muslims in their absence and do not probe into their secrets. The person who divulges the secrets of his brother in-faith, Allah Himself discloses the secrets of such a person and the person whose secret is divulged by Allah is disgraced even if he hides himself in a corner of his house."

In short the Shariah has prohibited espionage, probing into the affairs of other people and divulging their secrets from the very first day. It will not be out of place to relate an incident relating to Hazrat 'Umar (R.A.A.). Hazrat 'Umar (R.A.A.) climbed up the wall of a person's house and saw him commit a sin. He urged upon the man to desist from it. But the man retorted, "O Governor of believer! I have violated the command of Allah only in one of its aspects; whereas you have violated it in three aspects." The Caliph enquired as to what those three aspects were. He replied, "You have been guilty of spying in violation of Allah's Command not to spy. Again, you have climbed the wall of my house, whereas Allah commands to enter the houses of others through their doors. Nor is this all. You have not cared to greet me, whereas Allah says: Do not enter the houses of other people until you obtain their permission and greet them."

On hearing this Hazrat 'Umar (R.A.A.) took no punitive action but urged upon him to repent of his sin.

Hazrat 'Umar (R.A.A.) left the man unpunished and did not put an end to the excess he was indulging in because he came to know about the sin only after entering the sinners house; and his act of entering the house was in itself a transgression.

A similar incident has been related by Hazrat Abdur Rahman bin Auf. Says Hazrat Abdur Rahman:

"On one night I went out in the city of Medina accompanied

by Hazrat 'Umar (R.A.A.). As we moved on we saw the light of a lamp at a distance. We proceeded in that direction and on reaching the spot we found a house with its door closed and inside the house some people were making hulluhobo. Hazrat 'Umar pressed my hand and said: Do you know whose house it is? I replied in the negative. The Caliph told me that it was the house of Rabiyah bin Omaya bin Khalaf and that the people were drinking and making merry inside. He then asked me what to do about it. I said, offering my advice: Well, Allah, as you know, forbids spying." On hearing this Hazrat 'Umar retraced his steps without interrupting them in their orgy."

From the prohibition of probing and spying, we can draw the conclusion that it is improper for anyone to try to hear anyone singing or playing on a musical instrument in his house; to inhale the odour of intoxicants; to search his clothes to find out what is concealed in them and to enter his house to investigate what he has hidden there. In fact, no one is allowed to ascertain what is going in a neighbour's house.[1]

But if it is presumed that someone is, in all probability, committing crimes and this presumption is supported by clear indications of the unlawful activities or by a piece of intelligence indicative of the probability of such activities, as for example the odour of hemp rising from the offender's house or the firing of a shot or hue and cry heard therefrom, or the tiding given by a reliable person that the prospective offender has brought a woman into his house with the intention of murdering her then investigation and probe is justified in order to prevent the impending crime before it is committed and before a sacred taboo is violated.[2]

The rule prescribed in this respect is that if someone is within the four walls of his house, it is forbidden to enter it for the purpose of enquiring into a criminal act without prior permission of the occupant. But in case if two persons, or according to one juristic view, one person,[3] brings the news in advance that the occupant of the house is committing an offence, no permission is needed to enter the house. However, no permission is needed

1. *Ahya-e-Uloomuddin*, Vol.2, Part 5, p.34.
2. *Al Ahkam-ul-Sultania*, p. 218.
3. (a) *Asna-ul-Matalib*, Vol.4, p.180. (b) *Al Ahkam-ul-Sultania*, p. 218.

to enter it if the criminal activity in progress within is evident outside the premises; for instance, the odour of wine can be smelt or the noise of revelary made by the drunkards is heard from without.[1]

The evidence here is similar to the evidence of odour or noise. After the evidence is clear, nothing remains concealed and the secret is divulged of its own accord. According to the relevant injunction what Allah conceals, we should also conceal and whatever offence is detected, we should prevent it. There is a tradition of the Holy Prophet to this effect

> "Whoever sins should try to keep his sin secret. If he discloses it then we will apply Allah's *hud* to him or her. There are many a way to disclose a sin; for instance hearing, smelling, seeing and touching. We cannot confine the indication of sin to vision; for what is actually meant is to gain information and determine the facts in all probability and other senses also lead to information and determining facts in all probability."

Fourth Condition

Doing Away with Evils through Most Appropriate Means

The fourth condition of doing away with evil is to adopt the most appropriate means for the purpose. Thus if the person performing this function can take severe measures, it will be improper to adopt milder means. Similarly, if more severe measures are taken then necessary for defensive action the measures in excess of need would be treated as an offence. But if one does not posses the requisite power to do away with an evil, then lesser means should be resorted to, as for example one may use one's hand for the purpose. But if one is not in a position to do this much he can denounce the wrong or the evil by word of mouth or at least regard it as a sin.

The removal of evil by appropriate methods means that the means adopted for this purpose should vary in keeping with a change in the nature of evil and the circumstances of the evil-doer.

1. *Ahya-e-Uloomuddin*, Vol.2; Part 5 pp.36, 37 and 44.

(345) The Means of Defence Against the Wrong

The jurists have mentioned several methods of dealing with evil:

(1) Pointing Out (2) Exhortation and Preaching (3) Severe Prohibition. (4) Removal by hand (5) Threat of striking and killing (6) Striking and killing (7) Seeking Help from Others.

1 Pointing Out:

Pointing out in this context means that if a person is committing an offence without knowing, the most appropriate way to avert it is to apprise the offender of its being a forbidden act. This should be done mildly rather than roughly. Indication of evil in a mild and polite manner implies that the intending offender is unaware of the unlawfulness of the act and a knowledge of it would be distressing. As it is essential to tell the ignorant offender of the criminal character of the act in order to ward off evil, this should be done in a kind and polite manner, taking care that the information does not distress him; for troubling and distressing a Muslim without any reason is disallowed.

2 Exhortation:

Prevention of evil by exhortation and preaching. The object of exhortation and preaching is one who knows that an evil is an evil provided that exhortation and advice is expected to produce the desired effect by making one give up the evil. For instance a person who is in the habit of speaking ill of others in their absence knows that such an act is forbidden but is expected to give it up in consequence of exhortation and preaching. But care should be taken to prohibit him in a kind and polite way.

3 Prohibition with Severity:

This is done in the case of an obdurate evil-doer who is not susceptible to polite exhortation and benign preaching. There are two conditions laid down for the prohibition of wrong conduct in a severe manner:

(i) Stern prohibition should be resorted to only when the evil-doer does not respond to mild exhortation and therefore, severity becomes absolutely essential and (2) the person performing

the function of prohibition should always. tell the truth and avoid talking unnecessarily. He should not revile the evil-doer and should use only such admonitory expressions as are relevant and appropriated. For instance, he should not address the evil-doer by calling him wicked, stupid ignorant and idiot, for every sinner or evil-doer is wicked and a wicked man is stupid and ignorant in the real sense of the words. Had he not been so, he would never have disobeyed Allah. A man who does not have sense enough to realize his inequity is an idiot. Says the Holy Prophet:

> "Sensible is he who exercises self-discipline and makes preparation for the life after death, and stupid is he who obeys his desires and pins hopes of blissful life to the grace of Allah."

(4) **Warding off evil by the use of hand.** This means putting an end to an evil altogether; as for example, breaking musical instruments, spilling liquor stripping a man of silken clothes, throwing out a usurper from the land occupied by him unlawfully and removing barricades from the road and thorough-fare.

Use of hand is resorted to in the case of those evils which can by physically removed, but the evils of the tongue and the heart cannot be eliminated in this manner. Similarly, mental sins and offences associated with man's inner self cannot be physically removed.

However, the condition of the use of hand for this purpose is that the person removing an evil should not do so if he can prevail upon the offender to do away with the evil himself. Thus if he can make the usurper vacate the usurped land, he should refrain from dragging him out of it. Similarly, if a drunkard is willing to destroy the liquor himself, the person wishing to prevent him from drinking should not take the lead in destroying the intoxicant.

Another condition laid down for the use of hand to prevent or put an end to evil is that the force used for the purpose should be indispensable. For instance if a person forcefully occupying a house can be turned out of it by the use of hand, he need not be pulled by the beard or dragged by seizing him by the leg. Similarly if the weapons causing injury could be broken or rendered

unserviceable, there is no need to burn them. Moreover, such weapons should be damaged in a manner that the cost of repairing them is equal to their price. Again if liquor could be destroyed without breaking the container, then there is no need to break it.

According to the relevant rule, the use of hand in this regard is designed to do away with the evil and not to punish one who has committed an evil act or to warn one who has not yet committed it. Warning refers to the future and punishment to the past, while prevention of evil relates to the present. Now any individual of the society is competent to put an end to the evil. Whatever is done in excess of this would either amount to penalty for a past act or warning against a future act and these two functions are assigned to judicial authorities and not to individuals.

5 Threat of Injury and Killing

Threat to injure should as far as possible precede the threat to kill. The condition of threatening is that no threat is to be given whose translation into action is unlawful; for instance, intimidation to plunder the house of wrongdoer or to kill his offspring or to enslave his wife. If the person trying to put an end to an evil intends to carry out his threat, he would himself be doing something unlawful and if he does not mean what he says by way of threatening, then he will be telling a lie. Intimidation designed to ward off an evil should be practicable such as threat to scourge or break the head of the wrongdoer or threat to behead him. If the wrongdoer is expected to desist as the result of an unwarrantable intimidation which transcends what is actually meant, then such intimidation is allowed.

6 Striking and Killing

If needs be, the person discharging the duty of averting evil may strike the wrongdoer provided that such an action is absolutely essential and the blow inflicted upon him is commensurate with the need to do so; for instance, if the agent can be prevented from doing an evil act by a slap or single blow, it will be improper to subject him to further violence.

In case if evil cannot be averted without injuring the evil doer or showing him a weapon by way of warning, such a measure

would be warrantable, suppose, for example, the offender has got hold of a woman on the bank of canal while the person trying to prevent him from the misdeed is standing across the canal, the latter may show him a gun and threaten to shoot him if he does not release the woman. Similarly, the person performing the function of doing away with evil would be perfectly justified if he unsheathes his sword and warns the evil-doer to desist the wrong he is committing for prevention and elimination of evil is justified by every possible means. In the discharge of this duty there is no difference between the violation of the rights of Allah such as adultery and highway robbery and those of the individuals such as inflicting a blow, causing injury and usurpation.

If the agent does not desist form a criminal act in response to the prohibition of the person trying to prevent him, then the latter should fight him even if the act from which the evildoer is being prevented is of lesser evil than murder; for instance, a person wants to cut off a part of his own body and cannot be prevented from doing so without fighting, such a course ought to be taken even if the evildoer is killed in the fighting. For what is actually aimed at in such a case is to prevent the commitment of a sin and not to save a part of the agent's body. The reason for this is that to kill an offender in order to avert a sin is no offence, but amputation of a part of one's own body is a sin. This is like killing an assailant in order to protect one's property. Here the life of an assailant is not taken as a compensation for one's property but to ward off an evil act; for the assailant's intent to grab the property is criminal but killing him for the purpose of averting a sin is no crime.

7 Seeking Other People's Help

According to some jurists the person performing the function of warding off evil is not authorized to call others to his help if he is incapable of preventing the evil act and is in need of some people who can help him with their weapons. The reason given by jurists mentioned above is that such a measure would give rise to turmoil threatening peace and tranquillity; for the evil-doer may also call his supporters for help and that would lead to an armed conflict. However, if the *Imam* or the competent authority

permits those whom he may have specifically assigned the duty of enjoining good and preventing evil, this measure may also be taken to ward off evil.

There is yet another group of jurists who hold that individuals may call for help without the permission of the *Imam* or competent authority, because if one method of averting evil is permissible any other method should also be permissible. They are of the opinion that whatever the method adopted the possibility of an armed conflict cannot be ruled out and in armed conflict help is needed without which it would be impossible to perform the function of enjoining good and averting evil. Moreover, it is only in rare cases that a riot or turmoil is caused, and no injunction applies to a same event. Again, there is nothing in the Shariah which forbids to maintain that a person possessing the power of warding off evil may do so by his hand, weapon, personally or with the aid of his supporters.

(346) Would it be Right to Adopt the Above Methods in the Case of Every Individual?

Apart from parents, husband and authority the adoption of the above methods is justified in the case of all individuals.

So far as parents are concerned, their offspring may tell them what is right, may exhort and forbid them, but cannot be hard upon them or intimidate and strike them. However, according to one view the offspring may undo or avert the wrong acts of their parents without causing any injury to them; for instance, they may destroy the liquor to be used by their parents or return to the rightful owner any thing stolen or usurped that they may have kept in the house. Exception of parents to the general injunctions in this respect is based on the divine decree forbidding to affront and trouble them:

"Say not Fie! before them nor rebuke them." (17:23)

Other provisions also exist under which the parents are exempted from the general injunction. For instance, there is general consensus on the issue that the father is not to be slain in retaliation for the murder of his son by him and the executioner cannot kill his father for committing adultery, nor can he apply the *hud* for adultery to him as the offsprings are disallowed to punish their

parents for an offence committed by them in the past, how can they be allowed to afflict their parents for the prevention of an offence expected to be committed by them in the future?

The same injunction also holds good in the case of wife with regard to her husband. The Holy Prophet is reported to have said that if it had been permissible to prostrate before a created being, I would have enjoined upon the woman to prostrate before her husband."

This Tradition of the Prophet requires that a wife should abstain from troubling or distressing her husband.

No one can deny the wisdom of the observation that the subjects can only point out what is right or wrong to the ruler or the competent authority and try to prevent him from wrong conduct by exhortation. They are not authorized to stop them from doing something wrong by the use of hand for this would undermine the prestige and respectability of the ruler. The Holy Prophet has accordingly observed:

"Whoever wants to exhort the person in authority he should not do so openly. He should rather advise him in private. If the person in question takes his advice, well and good; but the man offering advice has discharged his duty."

Moreover, the Holy Prophet is reported to have said:

"Whoever insults divine authority on earth, Allah will insult him on earth."

(347) Limitations on Removal of Evil

If the person discharging the duty of prohibiting or doing away with evil adopts means that exceed the need to do so, he will be accountable for the excess. Similarly if he uses the means in question in excess of the prescribed limit, he will have to account for that as well. For instance, the person who undertakes to prevent a wrong act reviles the evil-doer while admonishing him he will be accountable for false accusation; for such accusation is not included in admonition. Similarly if a wrong act could be warded off by admonition and intimidation, and the person discharging the duty to prevent it beats or injures the evil-doer, the former will be accountable for the blow inflicted on or the injury caused to the latter. Again inflicting two blows on the

evil-doer or causing two injuries, when he could be prevented from committing a misdeed by a single blow, the person striking him will have to account for the second blow or the second injury. If an evil can be eliminated by hand, then no excessive measure should be taken in doing it. For instance, drinking and keeping liquor is a forbidden act. To prevent this act, liquor should be destroyed, but if the person preventing it does content him-self with spilling the liquor but also breaks the pots and glasses used in drinking, he would be accountable for overstepping the limit.

Prevention of a forbidden act before and after its occurrence is unnecessary. Only the act in the process of occurrence warrants preventive measures. If the act is yet to be committed, the mere intention of the evildoer is not enough to justify its action in anticipation. In fact such an action would be tantamount to transgression. But if the agent has already committed the forbidden act, whatever is said to him or whatever treatment is meted out to him does not constitute moral inhibition. It would rather amount to transgression against the agent.

The rule is that the means adopted to stop evil should be legitimate and not criminal. It should not exceed the limits laid down for the prohibition and prevention of evil.

But the steps taken to prevent the commitment of a forbidden act unwittingly affects a third unconcerned person besides the evildoer, such a step would be construed as a mistake, although the person trying to prevent the evil act takes it intentionally. Obviously the step is legitimate in relation to the evil-doer, but not in respect of any other person. But the intention of the agent in this case does not count, in as much as he intends to do a perfectly legitimate act. The rule is that whoever intends to do a lawful act but commits a mistake in doing it, would be responsible for the result of his act as one inadvertently and not intentionally guilty.

(348) Does the Evil-doer have the Right of Defence'?

A person committing a forbidden act does not have any right to transgress on the plea of self-defence or safeguarding his property provided that the person trying to prevent him from

doing the act does not over-step the prescribed limits. But if he oversteps then, his own act would be deemed transgression and the evil-doer will have the right to stop it.

(349) Difference between General and Particular Defence under the Shariah

A comparison between the general and particular defence under the Shariah would reveal that they rest on the same basis and are subject to the same injunctions. They differ only in details. Thus the subject of particular defence is any attack on or transgression against man's life, property and honour. This kind of defence is known in the terminology of Islamic jurisprudence as "Defence Against Aggressor", whereas the subject of general defence under the Shariah covers all those matters which are a threat to collective rights and collective security, apart from an individuals life, property and honour. This kind of defence constitutes the moral function of enjoining good and forbidding evil.

It may be said that this difference is only nominal; for defence against an offender as an aggressor may also be a defence against him as an evil-doer i.e. as one guilty of wrong conduct. But this way of looking at the matter is incorrect since defence against a misdeed may not necessarily be defence against the agent as an aggressor. The aggressor would be defended against only when an attack is made by him, i.e., a man's life property and honour is attacked. But defensive action is taken against a wrong act even when no attack or transgression takes place. For instance, suppose a person criminally assaults a woman. Defence against him would be defence as an aggressor. This constitutes particular defence. But suppose that the offender has the consent of the woman in what he is doing. In such a case the object of defence would be deterrence of an evil act and this would be general defence under the Shariah. Again, let us suppose that some one is going to kill a man. Defence against him would constitute defence against aggressor and the defender would be in a state of particular defence. But if a person is going to commit suicide, he would be prevented from this act as an evil and the person deterring it would be in a state of deterrence against and elimination of an evil. Similarly if a person is setting another

person's house on fire or is out to destroy it, defence against his wrongful activity would be defence against aggressor. But if a person is burning his own house or is destroying another person's belonging with his consent, any step taken to deter such act would constitute defence against an evil-doer. In other words the element of aggression and transgression marks off particular defence from general defence under the Shariah.

(350) Comparison of Shariah with Man-made Law

The provision for enjoining good and prohibiting evil exists in the Shariah right from the very beginning. It is a distinguishing characteristic of the Islamic Shariah, with which the man-made laws in force were acquainted only in the last century. But the above provision has been incorporated in the modern law to a very limited extent. By laying down the principle of enjoining good and forbidding evil, the Islamic Shariah means that every individual of the society should sit in judgment on the other as well as on the officials so that the people may solve common problems in an atmosphere of mutual understanding and spirit of co-operation and abstain from crimes and forbidden acts.

The Muslims were acquainted with the above principle in the earliest period of history and acted upon it in all its aspects. Thus Hazrat Abu Bakr (R.A.A.) in his inaugural speech said:

> "As long as I obey Allah, you should also obey me and when I disobey Allah, you cease to be under the obligation to obey me."

Similarly Hazrat 'Umar (R.A.A.) said after the assumption of his office as Caliph:

> "Whoever finds any aberration in my conduct, should set it right."

By the obligation imposed under the principle of enjoining good and forbidding evil, the individuals have become duty-bound to maintain public order, safeguard peace and security, curb the growth of crime in the society, and co-operate in fostering morals, thereby ensuring the security of society against cries and aberrations from the social norm, make it immune from disintegration and safeguard the social order from the onslaught of alien and subversive ideas and negative movements and thus nip evils and vices in the bud.

The principle of moral function was introduced into the modern law only in the beginning of the nineteenth century and recognized the individuals rights to criticise and provide guidance under given circumstances, to apprehend the culprits red handed and hand them over to the authorities. Under certain circumstances the modern laws have also come to admit of the right of the individual to use even force for preventing the offenders from committing offences prejudicial to the interests of community such as rebellion or subversion. Nevertheless, the modern laws in force do not admit of the principle of moral function without qualifications. They confirm its application to certain crimes in given circumstances; whereas the Islamic Law applies it to all crimes in all circumstances.

Second Category Correction

(351) Correction of Wife

The Islamic Shariah provides for the right of a husband to admonish his wife in matters wherein Allah makes obedience of husband obligatory for her; for instance if a wife does not come to him when he calls her or goes out of the house without his permission, a husband can admonish her. The right of husband in this respect is based on the following divine injunction:

"Men are in charge of woman." (4:34)

Again

"As for those women for whom you fear rebellion, admonish them and leave them alone to their beds and scourge them. Then if they obey you, seek no pretexts against them." (4:34)

The expression *'Nashooz'* occurring in the above verse means disobedience of husband. This word is derived from '*Nashaz*' which signifies rising. In other words, if she rises above the limit which Allah has laid down for the obedience to husband, she will be treated as disobedient.

(352) Matter Wherein Correction is Allowed

The jurists are agreed that a husband has the right to admonish his wife in forbidden acts that involve no *hud* under the Shariah

such as appearing unveiled before male strangers (men disallowed to enter ladies apartments), giving up adorning one's self leaving the house without husband's permission, disobeying him and destroying or wasting his wealth.

A majority of the jurists also prescribe *tazeer* for giving up prayers if a wife is Muslim.[1]

The jurists are also agreed that a wife is not to be scourged simply for fear of rebellion on her part. This measure is to be resorted to only when actually she rebels or oversteps the limit laid down by Allah.[2]

(353) Does the First Offence Warrant Corrective Measure?

Imam Malik and Imam Abu Hanifa hold that beating wife on the very first offence committed by her is not justified. Only repeated commitment of the same forbidden act warrants corrective remedy. Thus when a wife commits an act of disobedience for the first time, she is to be exhorted in a benign and affectionate manner; if she does it again, she is to be left alone but if she commits it a third time the husband will be within his right to scourge her. The advocate of this view argue that the repetition of the letter *'Wao'* in the following verse is designed to indicate the order of corrective measures to be taken against a disobedient wife:

"Exhort them and leave them alone to their beds and scourge them." (4:34)

Moreover, correction aims at warning against any possible offence in future, for which the order of measures indicated in the above verse should be taken into account.[3] This view advocated by a minority of the jurists of above school held by the jurists of the schools of Imam Shafi'ee and Imam Ahmed also.

1. (a) *Al Behr-ul-Raiq*, vol.5, p.35
   (b) *Asna-ul-Matalib*, vol.4 p. 162.
   (c) *Ahya-e-Uloomuddin*. Vol.4, p.146.
   (d) *Al Sharh-ul-Kabeer*, Vol.9, *p.* 168.
2. *Al Sharh-ul-Kabeer*, Vol.9, p. 168.,
3. (a) *Mawahib-ul-Jaleel*, Vol.4, p. 15-16.
   (b) *Muqaddamah Ibn-ul-Rushd*. Vol.2. p.104.
   (c) *Bada'e-wal-Sanae'*, Vol.2. P.334.

From this view it may be inferred that a husband scourging his wife on her first and second acts of delinquency would be liable to punishment but the one who resorts to scourging on her third act would be within his right to do so and such act would not incur any punishment. Similarly, a husband who strikes his wife for her third act of disobedience without exhorting on her first act or without leaving her alone on the second act would also be liable to punishment. In order to be absolved from punishment a husband will have to prove that his wife had disobeyed him twice before he struck her and that he had first exhorted her and then left her alone.

But the predominant position of the Shafi'ee and the Hamblite Schools is that it is the right of a husband to beat his wife whether or not she repeats the act of disobedience. They argue that repetition does not effect any change in the kind of penalty incurred by her and that the alphabet *(Wao)* occurring in the above verse is meant to add to punishments rather than to indicate any order in which punishments are to be successively given.[1]

It may be inferred from this view that a husband who strikes his wife for the first act of disobedience is liable to no punishment; for he exercises his right within the prescribed limits.

(354) Will a Husband be Required to Show-cause for Striking his Wife?

Imam Ahmed holds that a husband will not be required to tender explanation for striking his wife; for he may also punish her for refusing to come to him. He may feel ashamed of offering such an explanation, or may give some other reason which may not be true. Imam Ahmed substantiates his position by citing a Tradition of the Holy Prophet which Hazrat 'Umar is quoted to have narrated. It runs as follows:

Ash'as quotes Hazrat 'Umar as saying, "O Ash'as! Remember this saying of the Holy Prophet which I have myself heard:

"Do not ask any one why he struck his wife."

1. (a) *Al-Muhazzab*, Vol.2, p.74.
(b) *Asnaul-Matali'b*, Vol.3, p.239.
(c) *Al-Mughni*, Vol.8, p.163.

This Tradition requires that whatever reason a husband states should be accepted and the cause of his action should not be proved, except that should a wife struck her for reasons other than correction. In such-case the onus of proving the case would lie on husband.

No age limit has been fixed for the correction of a wife. A husband has the right to take corrective action against her at any stage of her life, regardless of her age. However, children's correction is permissible till they come of age.

(355) Limit of Scourging

A husband cannot scourge his wife as he chooses. This right of his is qualified by the injunction that the blow inflicted should be light, for the Prophet said:

"You have right to your wives to see that they do not allow any one sit on your beds whom you do not like. If they violate this right, then scourge them lightly."

Scourging lightly means to strike in a manner that the resultant injury is not grievous. Some jurists interpret the expression as striking in a manner that may cause pain but does not break her bone or cause her to bleed. Others maintain that it signifies beating in a manner which neither causes bleeding nor leaves any mark on the body and which is known as chastisement. There are still others who define light scourging as injury that does not cause bleeding; nor does it last for many days. Still others construe it as an injury leaving no mark on the body. All these interpretations mean the same thing in different words.

Corrective scourging is further restricted by the condition that it should not be done on sensitive parts (stomach) of the body.[1] The purpose of such punishment is only correction. It should not exceed reasonable limits and is generally regarded as a corrective measure. It so being the case, a husband will not be accountable for the measure taken by him.

It is permissible to use hand stick or whip for the purpose of corrective punishment.

1. *Al-Mughni*, Vol.8, p. 163.

There is yet another condition attached to the corrective punishment of a wife by a husband. In case if the act for which punishment is given is such that competent institutions have the power to award punishment for it. The husband does not prefer a case in those institutions and does not sue his wife. If he does, so, then the husband's right to correction stands invalidated.[1] The reason for this is that only the competent institutions are empowered to award punishment. Wherever a case is preferred to them, a husband ceases to have the right to punish his wife; for such a right is allowed to him as an exceptional case so that conjugal relations may not he prejudiced by the intervention of those institutions in every matter. For instance, if a wife commits theft in the neighbour's house or abuses neighbours wife, but the latter does not seek remedy from a competent agency, the husband may chastise her, but if the neighbour's wife does prefer the matter in such an agency, then the husband ceases to have any right to chastise her provided that his own right is prejudiced by the wife's offence. Let us suppose by way of illustration that a husband had already forbidden her to scold the neighbour's wife and to go out of the house, but his wife infringed the husbands instructions. The husband in such a case may punish her for abusing the neighbour and committing theft in violation of his instructions. If the husband has reasons to believe that his corrective action would be fruitless, then it will not be proper for him to chastise her. If he has strong reasons to surmise that the wife cannot be reformed without corporal punishment, he should not over-step the prescribed limit. In either case striking a wife would be deemed transgression.[2]

(356) Payment of Penalty for Loss Resulting from Corrective Punishment

If a husband strikes his wife for the purpose of correction and such corporal punishment results in her death or loss of any organ, he will be under no obligation to pay any penalty provided that the corrective action is taken within the limits prescribed by law and that such action is generally regarded as corrective measure.

1. *Mawahib-ul-Jaleel,* Vol.4, p. 15.
2. (a) *Mawahib-ul-Jaleel,* Vol.4, p. 16.
   (b) *Asna-ul-Matalib,* Vol.3. p.239.

But if the injury caused by it is grievous and cannot be termed as correction, then the husband will have to pay the penalty. This is the position taken by Imam Malik and Imam Ahmed.[1]

Imam Abu Hanifa and Imam Shafi'ee on the other hand hold that the husband is responsible for the wife's death, whether the injury inflicted by him is in the nature of correction or exceeds the limits of correction. Imam Abu Hanifa argues that correction is an act after which the person to be corrected must survive. If corrective measure results in the death of such a person or her in the loss of any of her organ, it is not correction but homicide or amputation of physical part. Imam Shafi'ee, on the other hand argues that correction or chastisement is not the obligation of a husband. It constitutes his right and depends upon his ijtihad or discretion. Hence he should be held responsible for his discretionary act. The Shafi'ites and the Hanifites of the subsequent generation maintain that correction of wife is the right rather than the duty of husband and the exercise of this right is qualified by the security of wife. Moreover this right is linked with the personal interest of husband, who may or may not exercise it.

Imam Malik and Imam Ahmed on the other hand argue that the exercise of the above right within the Prescribed limit is a lawful act and that no lawful act entails punishment;[2]

(357) Accountability for Corrective Action

From both the stand points discussed above it is clear that if corrective action does not exceed the limits prescribed under the law, the husband will be accountable for it neither on criminal nor on civil grounds, for correction is the right of husband bestowed upon him by the law-maker. The difference of opinion among the jurists as referred to above relates to a situation wherein corrective action within the prescribed 1 imit~ results in the wife's death or loss of any part of her body.

(358) Correction of Children

The right of correction or chastisement before the age of

1. *Al-Mughni,* Vol.10, p.349.
2. (a) *Al-Mughni,* vol.10, p.349.
   (b) *Hashya-al-Tahtawi.* Vol.4, p.275
   (c) *A'lam.* Vol.6, p. 166.

puberty is enjoyed by the father. The teacher or vocational instructor also has the same right. The guardian too, enjoys the right of correction as long as children remain under his guardianship. According to another view, if a father confers the right of correction on mother by appointing her guardian or if it is she who provides for the child, she may chastise and do whatever is necessary to correct him or her. In the absence of the father also she enjoys the same right. Apart from such cases, the mother does not have the right to chastise her offspring.[1]

(359) Conditions of Correcting Children

The conditions holding good in the case of wife also hold good in the case of children, that is, a child should be chastised for the fault he has already committed and not for one he is likely to commit in future. Besides, chastisement should be light in keeping with the age of the child. No tender part of his or her body such as the face or the stomach should be hit. Chastisement should be intended to correct the child and should not be excessive. It should be such as is generally recognized as a corrective act. If all these limits are taken into account in chastisement, the agent will not be accountable for his act as he is within his lawful right to do it.

(360) Penalty for Exceeding the Limits of Corrective Chastisement

According to Imam Malik and Imam Ahmed, if chastisement causes the child's death or loss of any part of his body and such chastisement constitutes the generally recognized form of correction and does not exceed the lawful limits, then the agent will not be accountable. But if the injury inflicted by way of chastisement is so grievous that it cannot be treated as corrective the agent will, according to this view, be impeachable.

Imam Shafi'ee on the other hand, holds that the agent in any case is accountable, for the child's death or loss of any part of his or her body; for correction is a right and not duty and the

1. (a) *Ahkamul-Quran. Jisas,* Vol.2, p.1.
   (b) *Hashya-al-Tahtawi,* Vol. 4, p. 275.
2. *Al Mughni,* Vol. 10, p. 349, 350.

agent may or may not exercise such right. When he exercises it, he will be accountable for the consequences of his act.[1]

Imam Abu Hanifa is personally of the view that a father, paternal grandfather and the guardian are responsible for the child's death or loss of a part of his or her body as husband is responsible in the case of his wife. But the Hanifites do not implement this view. Some of the jurists of this school even go to the length of asserting that Imam Abu Hanifa recanted his view later on. The Hanafite school enforces the view advocated by Imam Abu Yousuf and Imam Abu Muhammad. According to this view father, paternal grandfather and the guardian are permitted to chastise the child and, therefore, they are not accountable for the consequences of their corrective act. As regards a teacher or school master, Imam Abu Hanifa and his followers are of the opinion that if a child is beaten without the permission of father and the guardian, then the Agent is accountable on criminal grounds, as he exceeds the prescribed limit of chastisement and subjects to physical violence a child whose beating is not allowed for him. But if he beats a child with the permission of father or the guardian, he will not be impeccable for the consequences thereof; for if the teacher is conscious of his accountability for the consequences of chastisement, he will refrain from teaching the children. But as the people are in need of their children's education, the penalty in this respect has been annulled. In other words, the view of Imam Abu Hanifa and his school regarding the chastisement of children is in harmony with the position taken by Imam Malik and Imam Ahmed.[2]

Some jurists belonging to the Hanifite school differentiate between corrective chastisement and instructive chastisement. According to them chastisement for the purpose of correction is a right whereas chastisement for teaching is obligatory. Corrective chastisement is qualified by consideration of security but no such condition is attached to instructive chastisement. This difference, however, is confined to corporal punishment which is considered to be normal in respect of quality, quantity and space. In the case of excessive beating, payment of penalty is obligatory whether it is meant for instruction or correction.[3]

1. *A'lan,* Vol.6, p.166.
2. (a) *Bada'e-wal-Sanae',* Vol.7, p. 305. (b) *Hashya-al-Tahtawi,* Vol.4. p.275.
3. *Hashya-al-Tahtawi,* Vol.4, p.275.

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2. *Al Mughni;* Vol. 10, p. 349, 350.

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1. *A'lam,* Vol.6, p.166.
2. (a) *Bada'e-wal-Sanae',* Vol.7, p. 305. (b) *Hashya-al-Tahtawi,* Vol.4. p.275.
3. *Hashya-al-Tahtawi,* Vol.4, p.275.

In the light of this distinction chastisement by husband may be differentiated from chastisement by others. The former always aims at correction, whereas chastisement by the father, grandfather, guardian and teacher is sometimes designed to instruct and sometimes to correct. However, in the case of a child the contents of instruction and correction are co-mingled; for in such a case every corrective act aims at instruction rather than at warning.

(361) Difference of Positions

The position of *Imam Malik, Imam Shafi'ee* and *Imam Ahmed* is different from that of *Imam Abu Hanifa* in that the three *Imams* treat correction as a right and not as an obligation, whereas the Hanifites regard the correction of children as obligatory at least when it aims at instruction.

The point of difference between the position of Imam Shafi'ee on the one hand and that of Imam Malik and Imam Ahmed on the other is that Imam Shafi'ee qualifies the exercise of right by consideration of security whereas the two *Imams* do not lay down the condition of security if the right of correction is exercised within lawful limits. Hence the position of these two *Imams* as distinct from Imam Shafi'ee is in harmony with the view advocated by Imam Abu Hanifa, although correction according to this view is an obligation and not a right.

Third Category-Medical Treatment

(362) Medical Treatment an Imperative Duty

All the jurists are agreed that medical treatment is an imperative duty (fard-e-Kifaya) to be necessarily carried out by every individual of the society. No one is absolved from it unless someone else performs it. It has been imposed as a duty because it is a social necessity. If medical education aims at the treatment of the people or as medical practice and such education is enjoined as a duty, it would mean that the doctor or physician will have to carry out his duty without fail and the performance thereof would be mandatory. However, if there are more than one doctors or physicians in a town, then other citizens will be absolved from the duty in question; otherwise every citizen will be under

the obligation to perform it as an imperative duty which is not amenable to exemption.

It necessarily follows from declaring medical treatment as duty that the doctor will not be responsible for the consequences of performing it; for performance of duty as a rule is not restrained by consideration of security. As the choice of the method of treatment entirely depends on the discretion' of the doctor, his knowledge and practical ingenuity, and as he enjoys a legal right at the time of carrying out his function and is vested with extensive powers in respect of the method of treatment, the question arises if he will be accountable for the consequences of his treatment on criminal ground when it produces adverse effects on the patient.

There are no two opinions among the jurists with regard to the exculpation of the doctor from the adverse effects of his treatment. But they do differ on the cause of exculpation. Imam Abu Hanifa says that there are two grounds of doctor's exemption from accountability. In the first place, his services are social necessity and are as such his presence in the society is indispensable. This collective necessity requires that the doctor should be encouraged, his action should be treated as legitimate and he should be absolved from accountability for possible consequences of the remedy he chooses, enabling him to make the best use of his professional skill and knowledge with impunity. For his accountability on criminal ground will be highly detrimental to the society. Second ground of the absolving the doctor or physician from accountability is the permission of the patient's guardian. In short the social necessity and the guardian's permission both taken together constitute the cause of absolving the doctor from accountability.

The tenor of Imam Shafi'ee's argument is that the doctor is exempt from accountability because his action is permitted by the patient and also because the doctor means to do good to the patient rather than harm him. In the presence of these causes whatever the doctor does by way of treatment is permissible and if his action is warranted by the science of medicine and professional practice, he will not be amenable to accountability. Imam Ahmed Hanbal agrees with Imam Shafi'ee on this point.

Imam Malik, on the other hand, holds that the doctor's

unaccountability is first warranted by the permission of competent authority and secondly by the permission of the patient himself. The permission of the competent authority warrants medical practice, while the permission of the patient enables him to resort to any remedy he deems fit. Under the two requisite permissions the physician or the surgeon is absolved from any adverse consequence of the remedy he prefers, provided that such remedy is not inconsistent with the principles of medicine and medical know-how and that he does not err in his action.

In short, any act done by the doctor in the treatment of his patient does not involve accountability; for it is his duty which he performs and is not accountable for the consequences thereof, notwithstanding the unqualified freedom he enjoys in the choice of the method adopted by him for the purpose. For instance, if the doctor operates on his patient and the patient dies or if he prescribes a medicine which produces harmful effects resulting in the death of the patient he will not be amenable to accountability on criminal or civil grounds.

(363) Good Faith

It will be presumed that whatever the doctor does for the treatment of his patient he does it in good faith and with the intention of curing him or her. If the doctor treats him or her in bad faith with the intention of killing, he will be held accountable on both civil and criminal grounds even if his act does not result in the patient's death or in the development of some trouble in the patient. In fact, the treatment of the doctor acting in bad faith will be called to account even if his treatment results in the improvement of the patient, for whatever the doctor does in bad faith is prohibited and punishable.

(364) Doctor's Error

If the doctor errors in the treatment of the patient, he will not be called to account unless the error he commits is a glaring mistake. Now glaring mistake is an act which is warranted neither by the principles of the science of medicine, nor is accepted by medical experts. An ordinary medical error may be illustrated by actual incident. It is reported that once a girl fell down from the roof of the house and received a grievous head injury. A large

number of surgeons were of the opinion that if she was operated upon, she would die. But there was one surgeon who thought that immediate surgery was the only remedy to save her life. He expressed his willingness to perform the operation assuring that he would cure her. So he operated upon her. But the girl did not survive for more than a couple of days. The matter was then referred to a renowned jurist of the day, who gave the verdict that the surgeon was not accountable if he had performed the operation with the permission of the person concerned and had not violated the surgical procedure. In other words, he was absolved from civil or criminal liability. It was also enquired from the jurist if the surgeon was not accountable in spite of his undertaking that he would be responsible in the event of the girls death. The jurist declared that he was not to blame despite such assurance, for the doctor was accountable for a blunder or glaring mistake and not for his assurance of the success of the operation performed by him.[1]

(365) Permission of the Patient

The doctor's immunity from blame in the patient's treatment is qualified by the permission of the patient himself his or her guardian or heir. If there is no guardian or heir of the patient, then the permission of the competent authority must need be obtained; for in such a case the competent authority would be treated as guardian. In the case of patient having no guardian, the permission of the competent authority would be different from the general permission granted to the doctor for his practice.

(366) Permission of Competent Authority

There is nothing in the Islamic Shariah impeding the competent authority from prescribing the standards of medical practice by laying conditions of the doctor's qualifications and from prohibiting any one to start medical practice without prior permission of the competent authority. Also as has already been mentioned, Imam Malik's condition for absolving the doctor from accountability is the prior permission of the competent authority to start medical practice.

1. *Hashya-al-Tahtawi.* Vol.4, p.276.

A quack or one who starts medical practice without necessary qualification will be accountable for whatever he does as a pretended doctor. Says the Holy Prophet:

"If any one who is not a doctor takes to medical-profession, will be held accountable."

On intending to torment the patient is a criminal wilfully guilty. One who means to do harm to the patient is, according to one opinion, a delinquent and according to another opinion wilfully guilty.[1] The former opinion is preferable.

(367) Conditions of Unaccountability

It is clear from the foregoing statement that there are four conditions of a doctor's exemption from accountability:

(1) The doctor should be a qualified practitioner.
(2) He should treat his patient in good faith and with the intention of curing him or her.
(3) His treatment should conform to the principles of medicine and medical practice.
(4) He treats, the patient with the permission of the patient or his heir, guardian etc.

If all the above conditions are fulfilled the doctor will not be accountable for the consequences of his treatment. But in the absence of any of the four conditions, he will have to account for the consequences.

(368) Para-medical Staff

The Para-medical staff attached to the doctor consisting of the chemist or apothecary, the phlebotomist, the cupper and the surgeon performing circumcision are subject to the same injunction as is applicable to the doctor (Medical practitioner); for instance, the surgeon mentioned above should know his job and he does the job in good faith and performs circumcision with the intention of only circumcising the patient. His operation should conform to the principles of his specialized field of surgery and he performs the operation with the permission of the person to be circumcised or his guardian.

1. (a) *Sharhu-ul-Zurqani Ala Mukhtasir Khaleel*, pp. 116-117, Vol. 8.
(b) *Nihayath-ul-Muhtaj*, Vol.8. p. 32.

(369) The Shariah and Modern Laws Compared

In the authorization of medical practice the Shariah and the modern laws are in harmony and the rules contained in the modern laws as to the exemption of the doctor from accountability for the consequences of the treatment are identical with those provided for by the Shariah. Thus according to the modern laws, too, the medical practitioner should be a qualified doctor, should treat his patients in good faith and with the intention of curing him or her, his treatment should conform to medical principles and should undertake treatment with the permission of the patient.

But the modern laws treat medical profession as a right, whereas the Shariah declares it to be a duty. Evidently the position of Shariah is more adequate than that of the modern law; for according to the *Shariat* concept it is obligatory for the doctor to devote his abilities to the service of the community. Moreover, it is in tune with our pattern of social life which is based on the principle of working shoulder to shoulder and mobilizing all our resources for the good of the society.

The scholars of modern law and the people entrusted with the task of the administration of justice give various reasons for the exemption of the medical practitioner from accountability. The British legal pundits and judges attribute his unaccountability to the consent of the patient. The German and French scholars of law hold identical views. The Egyptian legal scholars also formerly subscribed to the same view. Some French legal pundits however, offer a different explanation. They hold that the reason for the doctor's exemption from blame is his intention not to commit an offence and that he treats his patients simply to cure them. The Egyptian courts subscribed to this view for a certain period. But now the consensus of the French and the Egyptian lawyers and judges is that the doctor remains exculpated from the consequences of his treatment in as much as medical practice is a lawful profession and an essential social service. The state, therefore, regulates it and encourages it.

These explanations are not any different from the Islamic jurists' explanation of the doctor's unaccountability in case his treatment produces harmful effects in the patient.

Fourth Category

Athletics and Sports

(370) The Position of Shariah vis-a-vis Sports and Athletics

The Shariah stresses the importance of such sports as require courage and valour. The reason is that such sports strengthen the body and cultivate the mind. They also exhibit skill, courage and powers. The Shariah acknowledges the value of such sports. They include all those sports which are known today as athletics and competitions of various kinds.

The Shariah approves of all those athletics and sports which provide opportunities of demonstrating superiority, strength and skill and which are useful in time of peace, e.g., events of horse race or any other race, high jump, sawing, throwing, boxing, weightlifting swimming and competitions of archery, swordsmanship, shooting and spearmanship.

The position of the Shariah regarding horsemanship and other valourous sports is absolutely clear. It does not only allow them but also encourages them. Says Allah:

> "Make ready for them all thou canst of armed force and of horses tethered." (8:60)

And the Prophet has said:

> "Listen, lancing is the demonstration of force. Listen, lancing is the demonstration of force."

There is yet another relevant Tradition:

> "A strong Muslim is better than a weaker Muslim."

Yet another Tradition to the same effect:

> God Almighty will send three men into Paradise as a reward for a single arrow: One of them is the man who makes it, the second is one who shoots it and the third is one who bears it. Shoot the arrow and ride the horse. With me archery is better than riding. Three forms of play are commendable: Grooming one's horse, playing with one's wife and children and shooting an arrow with one's bow. The man, who acquires skill in archery and then gives it up, relinquishes a gift."

It is an established fact that the Holy Prophet won an event of race and took part in a camel race. When he participated in a shooting competition with one of the archers, the rival archers withdrew and said, "In the event of your joining the rival team, we cannot compete. The Prophet replied that they should carry on as he was with all of them. It is also an established fact that the Holy Prophet threw down a wrestler named Rakana in a bout. It has also been proved that he threw a spear skillfully and rode the horse with and without a saddle."

The Prophet's companions were keenly interested in carrying out the above commands. For instance, it is reported by Hazrat Mas'ab (R.A.A.) that his father Sa'd used to tell his sons that they should require skill in archery as it was the best sport. Similarly Hazrat Umar once wrote to Hazrat Abu Ubaida-bin-Jarrah (R.A.A.) advising him to teach his children shooting of arrows and swimming.

Again Hazrat 'Umar (R.A.A.) wrote to the Governor of Azar Baijan:

> "Be strong, be efficient and cut off the horse's spurs and mount him with a high jump, and acquire marksmanship."

A general rule of the Shariah is that any science art or industry which is useful for the Ummah either in this world or in the hereafter is a *'fard-e-kafaya'* or an imperative duty from which the general run of people is absolved if it is undertaken by a specific set of people. Teaching of such sciences arts etc. is mandatory and admits of no choice. For this reason all the sports which constitute demonstration of courage, valour and force are *fard-e-kafaya* an imperative duty which no individual can escape.

In archery competitions and other events the Shariah provides for compensation to be paid to those who compete. The jurists, however, differ on the question as to the sports in which compensation or prize is to be allowed.[1]

Imam Malik is of the opinion that compensation is to be

1. According to the Malik and Hambali Schools compensation or prize is allowed only in archery, horse race and camel race. The jurists of the Shafi'ee and Hanafi Schools. say it is permissible also in race rowing weight-lifting, swimming, finger-locking competition and races contested on the back of mules, competitions of donkeys, cows and elephants. However, there are minor differences of opinions between the jurists of the two schools on this question.

paid from *bait-ul-mal* (state treasury) because the martial sports benefit the entire society and thus provide an opportunity of military training to the individual. The three Imams Abu Hanifa, Shafi'ee and Ahmed Humble say that payment of compensation to the sportsman both from the state treasury and by any individual is admissible. They also maintain that such compensation may be paid even by any participant of competitions on the condition that if he wins he will get the prize and if he loses he will not be entitled to it.

(371) Injunction Regarding Injuries Received in Sports

In martial arts and sports the players and spectators are likely to receive injuries. The principle laid down by the Shariah to deal with such cases is that if sports do not involve violence and force and require neither use of force by the rival players, nor infliction of blows and injuries, then the cases of injury will be decided in accordance with the general law of the Shariah. This is because injuries and blows in such cases are not a part of the game. If an injury is inflicted intentionally, the agent will be accountable as one wilfully guilty. However, in the case of an injury resulting from carelessness and arrogance, the agent will be accountable as unwillingly's guilty.

As regards the sports which necessarily involve use of force against the antagonist, such as rowing, or those wherein infliction of blows and injuries is an essential part of the game, such as boxing or polo the agent will not incur any punishment for the injuries caused by him, provided that he does not infringe the prescribed rules of the game. The reason for this is that the injuries naturally result from such sports. But if the player inflicts an injury or blow in contravention of the prescribed rules or does so intentionally, he will be deemed intentionally guilty of a crime. In case he inflicts an injury inadvertently he will be treated as unwillingly guilty.

1. (a) *Mawahib-ul-Jaleel*, Vol.3. p.390.
   (b) *Majaum-ul-Anhar*, Vol.2, p.566.
   (c) *Al Mughni*, Vol.11. p.128.
   (d) *Al Farosia*, p. 69.
   (e) *Hashia Ibn Abideen*, Vol.5, p.657.
   (f) *Tuhfat-ul-Muhtaj*, Vol.4, p.215.

(372) The Shariah and Modern Laws Compared

We have explained the Shariah injunction above with regard to sports exhibiting courage and bravery. So far as the modern laws in effect are concerned, they are at variance with one another in this respect. The laws of some countries allow the sports in question while those of other treat the injuries caused in such sports as offence. In USA, for instance, there is no ban on them in some of the states, while in others the injuries resulting from them constitute offences. The courts in Belgium award punishment for injuries caused in gymnastic competitions, while the French courts exculpate the agents. In England, Italy and Germany, it is generally presumed that such sports are lawful within prescribed limits and therefore involve no accountability. Similarly in France and Egypt, some courts hold the agent accountable for injuries caused by him in these sports while others absolve him from accountability. The position of the former courts is preferable.

The pandits of modern law differ on the cause of the agents exculpation. Some of them say that absence of intention is the cause of his being free from accountability. Others attribute his unaccountability on the victim's willingness to receive injuries. There are still others who hold that the state legalize such sports by including a provision for them in their laws and encourage the people to take part in them. That is why the person participating in them exercises his lawful right and exercising one's right does not incur accountability. This is the latest position which is absolutely correct. Implications of accepting this position would be the same as accepting the conclusions by the Islamic Shariah. The only difference between the position of the modern law and that of the Shariah is that according to the Shariah the sports exhibiting courage and bravery are obligatory for the individual, while the modern laws treat them as a right and not as an obligation.

Evidently the concept of the Shariah in this respect is much more convincing than that of the modern law, because sports are a social necessity and from the view-point of health, morality and common weal they are in the interest of the nation. There is no country in the world today which does not encourage sports. In educational institutions sports are compulsory along with courses

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of study. In fact in the police and military training institutions they are given top priority. If sports, then, are vital in the life of a nation, it is reasonable that they should be treated as a duty rather than as a right; for there can be no escape from duty, whereas a right involves choice between commission and omission.

Fifth Category

Vulnerability of Persons

(373) The Meaning of Ihdar

Ihdar (or what may be called vulnerability in the absence of an accurate equivalent in English) means to declare unprotected or exposed to impunitive injury. The provision pertaining to it is applicable to a human being, parts of his body and property. If the injunction of vulnerability is applied to a person, it is permissible to injure him or cut off any part of his body or kill him. If it is applied to a particular part of his body, only that part may be amputated with impunity. Again, if the injunction in question is applied to his property, it is warrantable to take away his property in the same way as seizure of the property of a citizen belonging to a non-Muslim country is warrantable. We propose to discuss here vulnerability of persons. Vulnerability of property is beyond the scope of our discussion.

In short, the purpose of declaring a person vulnerable is to justify the destruction of a part of his body. The person declared vulnerable is one who is subject to the injunction regarding impunitive mutilation of a part of body.

(374) The Reason for Declaring a Person Vulnerable

The only reason for treating a person as exposed to impunitive mutilation is the invalidation of the legal guarantee of his security. The legal security of a person is invalidated either because the case thereof does not exist any longer or because he commits an offence which nullifies the guarantee of his security.

Lapse of Security Resulting From Lapse of Cause

A general rule of the Shariah is that man has a right to the security of life and property and it is unlawful to infringe this

right. The basis of security is either belief or guarantee of protection. Belief means faith in Islam and guarantee of protection means agreement of protection or truce or any other agreement of the like nature. The Muslims enjoy the right to security of life and property by dint of their faith in Islam as has been provided for in the following Tradition of the Holy Prophet (S.A.W.).

> "I have been commanded to wage a crusade against the people until they admit that there is no god but Allah and that Muhammad is the Messenger of Allah. When they acknowledge this, their life and property is safe from me except that some right has to be restored."

By virtue of the guarantee of protection the life and property of non-Muslims is secure likewise. The following verses are to be found in the Holy Quran containing provisions for the guarantee.

> "O ye who believe! Fulfil your undertakings." (5:1)
>
> "Fulfil the covenant of Allah when ye have covenanted." (16:91)
>
> "If they incline to peace, incline thou also to it." (8:61)
>
> "So long as they are true to you, be true to them." (9:7)
>
> "Fulfil their treaty to them till their term." (9:4)
>
> "And if any one of the idolators seeketh thy protection (O Muhammad)), then protect him so that he may hear the word of Allah, and afterward convey him to his place of safety." (9:6)

The Prophet's Saying to the same effect are as follows:

> "The Muslims are bound by their commitments."
>
> "Our faith disallows violation of covenant."
>
> "The word of all the Muslims is one and it is incumbent upon every Muslim to strive to fulfil it, regardless of his rank. So, whoever breaks the word of a Muslim, he is accursed by Allah, angels and the entire humanity. No penalty or compensation shall be accepted from such an accursed person."

Again,

> "When you are faced by your idolaterous enemies, invite them to three things: Invite them to embrace Islam and if they do so, accept their faith and do not attack them. If

they refuse to embrace Islam, then ask them to pay *jazya* (capitation tax levied on non-Muslims in lieu of their protection). If they are willing to pay *jazya*, accept it and refrain from attacking them. But if they are not prepared to pay then wage a holy war against them with God's help."

The Shariah provides for two kinds of protection; provisional and permanent protections. Provisional protection is given for a fixed period, whether short or long. The provisional protection is granted under the terms of truce and agreement guaranteeing the peaceful behaviour of the subject protected. It also applies to agreements concluded between Islamic and non-Islamic governments providing for permission of staying to each other's citizens and protection in their respective countries.[1]

Permanent protection is granted for an indefinite period. It is not amendable to expiry. Such protection is allowed only under an agreement with Zimmi (agreement under which a Muslim Government takes charge of non-Muslims or takes them into custody with full guarantee of protection). It can be enjoyed only by those non-Muslims who are permanently settled down in Darul Islam and undertake to abide by the injunctions of Islam.[2]

According to one of the tenets of Shariah the world is bifurcated into the world of Islam and the world of *Kufr* (infidelity). The world of *Kufr* is further subdivided into two parts. The nations having ties with Islamic world and those at war. The former consist of infidels who may have signed peace treaties or agreements of non-interference with the Islamic world. The infidels at war with Islam are called *'harbies'*. Apart from the *harbies* the lives and property of the nationals of all the lands in the world are under protection either by virtue of their Islamic faith, peace treaty, or rather, because of their faith or guarantee of protection.[3]

1. (a) *Bada'e-wal-Sanae'*, Vol.7, p 106
   (b) *Asna-ul-Matalib*, Vol.4. p.210.
   (c) *Mawahib-ul-Jaleel*, Vol.4. pp.360-364
   (d) *Al-Mughni*, Vol.10, p. 458.
2. (a) *Al-Mughni*, Vol.10, p. 567.
   (b) *Nihyatul-Muhtaj*; Vol.8, p. 80.
   (c) *Bada'e-wal-Sanae'*, Vol.7, P 110.
3. The reader is referred back to clause 211.

As the basis of security is either faith and guarantee of protection, such security would naturally lapse with the nullification of the basis thereof. Thus if a Muslim turns an apostate or is excommunicated, his security is no longer guaranteed. The guarantee of security of a non-Muslim under protection or enjoying protection under an agreement or a Zimmi (non-Muslim citizen of Islamic State) and all those who are subject to the injunction applicable to the said non-Muslims, would be null and void with the expiry of the period for which it is allowed or with the abolition or violation of the agreement of peace or protection. When such guarantee is annulled, the non-Muslim concerned will be subject to the injunction pertaining to the *Harbi* inasmuch a *Harbi* is under no protection.

When the guarantee of security of life and property is annulled, the life and property of the person concerned is no longer secure and, therefore, they become lawful for the Muslims; This exactly is the meaning of *'Ihdar'* (vulnerability). As the injunction of protection is inoperative in the case of the life and property of an apostate or a *Harbi*, the apostate and *Harbi* both are vulnerable. The cause of their vulnerability, obviously, is the lapse of the guarantee of their security. Nullification of guarantee of security in consequence of the commitment of offences incurring vulnerability.

The guarantee of security would lapse with the commitment of offences entailing vulnerability just as it lapses on account of apostasy, cessation protection or violation of the agreement of peace or non-interference. Offences entailing vulnerability are those whose punishments have been prescribed by the Shariah and by the application of those prescribed punishments the offender loses his life or limb. There are five such crimes:

(1) Adultery committed by a married person (2) Robbery and bloodshed (3) Rebellion (4) Wilful homicide or wilful amputation of limbs and (5) Larceny.

There are two conditions attached to an offence incurring vulnerability. Both the conditions are essential. The first condition is that the offence should be one whose punishment has been prescribed by the Shariah beyond question. It should be a *hud* or

qisas crime and not one of the penal crimes whose punishments have not been prescribed.[1] The second condition is that prescribed punishment should consist of condemnation of death or amputation of the offender's limb.

If any of the above two conditions is absent, then offence in question would not entail vulnerability; for instance, the kind of theft that does not incur amputation of hand such as the one committed by a father who steals his own son's property. Another example of such offence is provided by wilful homicide for which *diyat* is obligatory. None of the offences of the kind mentioned above incurs vulnerability, as the punishment thereof does not involve loss of the offender's life, although it does entail *diyat* as the prescribed punishment. Again, take for example, the crimes such as fornication by an unmarried person, calumination or drinking liquor. Punishments for all such offences have been prescribed by the Shariah but the punishments so prescribed do not involve the loss of offender's life. Hence they are non-vulnerable offences. The same injunction would apply in the case of a crime which entails death sentence not as a prescribed punishment but as '*tazeer*' (penal punishment).

No sooner is an offence incurring vulnerability is committed than the guarantee of the offender's security will stand annulled, and not at the time of awarding the punishment; for the basis of annulment is the commitment of the offence and not the sentence passed against the offender. Moreover, the prescribed punishments are actually *hudood* which have of necessity, to be immediately translated into action in pursuance of the general principles of the Shariah. They admit neither of delay, nor remission, or postponement, save *qisas* which may be remitted by the guardian or heir of the victim. In short *hudood* are mandatory punishments and there can be no escape from them. Hence there is no justification for putting off the suspension of security till the passing of sentence.

The right of forgiving the offender enjoyed by the victim or his heir does not affect the general principle of the Shariah; for in the case of *qisas* invalidation of the guarantee of security is not absolute. It is rather relative to the heir or guardian of the victim. The offender is innocent in relation to all the other people.

1. The reader is referred back to articles 51 and 103.

Therefore, if the victim or his heir or guardian forgives the offender, the punishment constituting the loss of offender's life would be null and void and the offender's right to security would be restored.

Apart from the offences mentioned above, the guarantee of security is not nullified in the case of any other crime even if the offender is sentenced to death provided that the punishment of death is penal. The reason for this is that the person in authority is vested with the power of remitting punishment as well as pardoning the offence and therefore, such punishment is not imperative, and a non-mandatory punishment does not annul the guarantee of offender's security, nor does it make the offender's life vulnerable even if the punishment is a death punishment and the death sentence has already been passed. The reason for this is that the person in authority may remit the punishment at the last stage and he will be within his right to do so.

(375) Muhdareen or Vulnerable Persons

The sum and substance of the foregoing statement is that the vulnerable persons fall under the following categories:

(a) Harbi (b) Apostate (c) Married Adulterer (d) Maharib (e) Rebel (f) Offender incurring *qisas* (g) Thief.

The Shariah provides for separate injunctions , for each of these crimes. We discuss them here one by one:

(376) (a) Harbi

A Harbi is the person who belongs to a non-Muslim state at war with an Islamic state. A Harbi is also one who is allowed protection in an Islamic state under an agreement but whose agreement of protection expires or who breaks, the agreement under which he is allowed protection .

All the jurists are agreed that a Harbi is vulnerable or amenable to impunitive attack or homicide. Thus if any one kills or wounds a Harbi, he kills or wounds a person whose killing or wounding is lawful. A lawful act cannot obviously be punishable. Nevertheless, in certain cases the person killing or wounding a Harbi may be punished on the ground that he presumes himself to be the executive force and thus prejudices the power vested in the law enforcing or competent authority.

However, killing of Harbi incurs no punishment in the battlefield or in self-defence. The modern laws in force are in accord with the Islamic Shariah.

In case if a Harbi is killed without justification at a place other than a battlefield, as for example if he is killed in an Islamic state by the Muslim who apprehends him or takes him a captive, or is killed by someone else, then the Muslim killing him will not be accountable for the murder of the said Harbi's a killer. The reason for this is that shedding of such a Harbi's blood is lawful, and his arrest or captivity does not ensure his security. He continues to be vulnerable after his apprehension and imprisonment. In short, whoever kills a Harbi does an impunitive act as he kills one who is declared vulnerable by the Shariah and such a murder incurs no accountability as a killer. However, his act does entail accountability inasmuch as it prejudice the powers of the person responsible for the captive he kills. For this reason the killer will be accountable for encroaching on the authority of the rightful person and will as such be liable to punishment.

It is obligatory to kill a Harbi in the battlefield and in self-defence. In other cases it constitutes a right and not an obligation.

The injunctions of the Shariah discussed above are at variance with the modern laws in force. According to these laws such a murder would be treated as wilful homicide and the killer will be punished accordingly. But in practice, the modern courts take into account the circumstances of both the offender and the victim and award a light punishment. In other words, the Shariah in effect, is in agreement with the modern laws in respect of awarding punishment, but is at variance with them in its position as to the nature of the act for which punishment is awarded. The modern laws treat such act as punishable while the Shariah treats encroachment on the authority of the person concerned as punishable rather than the act in itself.

(377) (b) Apostate (*Murtad*)

An apostate (*Murtad*) may be defined as a Muslim who renounces the faith of Islam. In other words apostasy in the Shariah

terminology applies to a Muslim alone. If a non-Muslim renounces his religion, he is not treated as an apostate or *'murtad'*.

According to the Shariah taking *'murtad's'* life is an impunitive act or one exempt from punishment.[1] Hence if some one kills him, he will not be deemed as wilfully guilty,[2] whether he does so before allowing the apostate a chance to repent or thereafter; for as long as the offender persists in apostasy, he is open to any maltreatment with impunity.

The general rule in this regard is that the apostate should be punished by the competent authority and if any body else kills him he commits a wrong act as he encroaches on the power vested in such authority. But the person in question will be liable to punishment for his act being prejudicial to the power of the competent person and not for homicide. This is the view advocated by the jurists belonging to all the four Schools.[3] However, a dissident view[4] is also to be found in the Malikite school of thought. According to this view, although an apostate is insecure, his killer will be liable to penal punishment and compensation will also be paid to the Bait-ul-Mal or state treasury. The jurists advocating the foregoing view argue that it is obligatory to call upon the apostate to repent and that he turns an infidel as the

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1. There are two reasons for the vulnerability of an apostate's life. As long as he remains a Muslim he enjoys guarantee of security because of Islam. No sooner he ceases to be a Muslim than the umbrella of security is withdrawn and his life becomes vulnerable. The second reason is that the penalty of death incurred by an apostate is a *hud* punishment and not a *tazeer* or penal punishment. The Holy Prophet has allowed homicide in three cases: "in the case of one who reverts to infidelity after embracing Islam; and one who being married commits adultery and one who commits murder without any reason." The Prophet also commands: "Kill the person who renounces his faith." In short the punishment of apostasy is death penalty. Thus if one keeps in view the punishment prescribed for apostasy, it turns out to be an offence whose agent's killing is impunitive. But as the basis of apostasy is deviation from Islam which, in its turn, constitutes the basis of the offenders security, only the first of the above reasons is kept in view in treating the life of an apostate as vulnerable.
2. The jurists have laid down the condition that before applying the injunction pertaining to apostasy the offender should be called upon to repent. If he refuses then he should be killed.
3. (a) *Al Bahrul-Raiq.* Vol.5, p.125.
   (b) *Al Muhazzab.* Vol.2, p.238.
   (c) *Mawahib-ul-Jaleel.* Vol.6. p.233.
   (d) *Al-Iqna.* Vol.4, p.301.
4. *Al Shahrul Kabeer, lil Durdeer.* Vol.4. p. 127.

result of apostasy. Anyone killing an infidel takes the life of a person whose murder is a wrongful act. That is why compensation or *diyat* for his life must be paid to the Bait-ul-Mal or the exchequer of Islam; for Bait-ul-Mal alone is the heir of an apostate. In other words, the advocates of this view hold on the one hand that the guarantee of security is invalidated by apostasy and, on the other hand, maintain that an infidel is secure; The discrepancy inherent in this view is obvious enough to reject it as fallacious. We may oppose it by maintaining that as long the apostate is a Muslim, he is secure by virtue of Islam and when he deviates from Islam or reverts to infidelity he is no longer secure and that security is ensured by the agreement of protection or peace and not by virtue of infidelity As the apostate does not come under either of the agreements, he cannot be treated as enjoying the right of security after his reversion to infidelity.

The killer of an apostate is liable to punishment for encroaching on the power of competent authority or for the contempt of such authority when the competent authority reserves the right of exercising such power to himself. But if the courts or other judicial institutions do not award punishment for the offence of apostasy as is generally the case with courts in Islamic countries today, then these competent institutions are not empowered to award punishment to the killer of an apostate and also it will be wrong to treat the killer as guilty of encroaching on the powers of such institution; for the killer would be liable to punishment only when the institutions in question assume the responsibility of enforcing the injunctions of which the individuals take upon themselves to enforce, the latter can never be called to account for encroaching on the powers of the former.

A general rule laid down by the Shafi'ee school in this respect is that a vulnerable person has the right to security against another vulnerable person.[1] Hence an apostate will be liable to punishment for killing another apostate. If he does so, he will be treated as guilty of wilful homicide, even if he rejoins the fold of Islam later on. On the contrary if a Muslim takes the life of an aspostate, he will not be deemed a killer. The same general

1. (a) *Asna-ul-Matalib.* Vol.4, p. 13.
   (b) *Sharh-ul-Ansari Alal Behjah,* Vol.5. p. 34.

rule will according to the majority of the Shafi'ites, be applicable to the case of killing of an apostate by a Zimmi (a non-Muslim protégé of an Islamic state).[1] The Shafi'ite apply this rule indiscriminately to all the vulnerables, but the jurists of other schools do not accept it.

Under the Islamic Shariah the killing of an apostate is an obligation imposed upon every individual rather than a right inasmuch as punishment for apostasy constitutes a *hud* which must need be enforced.

The modern laws in force are at odds with the Shariah on this point. They do not treat a mere change of religion as punishable. They rather apply the concept of Shariah to a person who deviates from the system on which the society is based. Thus the communist states punish their citizens for renouncing communism. Similarly the Fascist states punish their citizens for rebelling against their system and for supporting communism or democracy. The democratic countries are at daggers drawn with the communist or Fascist systems and treat them as criminal. In other words, violation of the basic systems of the society occupies the same position in the modern laws as does rebellion against the Islamic system in the Shariah. As Islam constitutes the basis of Islamic social order, revolt against Islam is punishable. It may be inferred from the foregoing discussion that the Shariah and the modern laws are not at variance in principle. They differ only in the application of principles. The Shariah treats Islam as the basis of the society, which naturally calls for the punishment of apostasy in order to ensure the security of the social system. The man-made laws in force, on the contrary, regard a social ideology instead of religion as the basis of social order. That is why they do not treat change of faith as unlawful. They rather impose a ban on every ideology inconsistent with the one on which rests the wharp and woof of the society regulated by them.

The existing Egyptian penal law has been framed on the pattern of modern laws in force. Thus it does not provide for any punishment for apostasy, although the social order of all the Islamic countries rests on Islam. But absence of a provision for

1. *Sharh-ul-Ansari Alal Behjah,* Vol. 5, p. 3.

the punishment of apostasy in the Egyptian law does not mean that apostasy is lawful. On the contrary, apostasy according to the provisions of the Shariah is a capital crime. These provisions are still valid, will continue to be so as long as Islam exists and cannot be rescinded or suspended by the man-made laws in force.[1] Hence if anyone kills an apostate, he will on no account be liable to punishment and cannot be treated as guilty of encroaching on the powers of competent authority; for he does a lawful act and discharges his duty imposed by the Shariah.

It may be noted that although the Egyptian penal law contains no provision for the punishment of an apostate, yet it does not prejudice any act done as a right in good faith in pursuance with a provision of the Shariah. (see Clause 60 of the Egyptian penal law). The clause is enough to warrant exemption of the killer of an apostate from punishment. It may be said that killing of an apostate is an obligation and not a right. The answer to such an objections that an obligation is equal and ever transcendental to a right. Now if we look at the matter from the standpoint of the person who is the object of killing, then the act in question amounts to the right of the agent, for such act is justified both as a right and an obligation and the offender who is to be killed cannot challenge it as the agent is competent to do the act both as a right and as an obligation. But if we look at the matter from the standpoint of moral and religious responsibility, obligation occupies a position of higher order than right inasmuch as obligation must need be fulfilled, whereas the exercise of right is optional. In other words, the difference between obligation and right manifests itself when a responsible or obligated person is held accountable for omitting an obligatory act; for omission of such act makes him liable to punishment; whereas relinquishment of a right entails no punishment. Hence if a person vested with the right of doing an act and having the choice to exercise it or not can be exempted from accountability for doing a legitimate act, then one under the obligation to do it will be the more exempt as he would be doing an act which is incumbent upon him to do.

In addition, article No.7 of the Egyptian law contains a provision to the effect that the law of the land cannot prejudice

1. See Article 191.

the personal rights bestowed by the Islamic Shariah. As a matter of fact, if we take into consideration the obligatory aspect of the act in question the obligations imposed by the Shariah are also tantamount to personal rights. Let us take for example medical practice. It is obligatory for a qualified doctor and under the Shariah it is mandatory. But the Shariah at the same time provides for the right of the medical practitioner to wound his patient or cut off any part of his body. Killing of an apostate is an obligation of every individual and he is responsible to the law-maker for it but at the same time it also assumes the character of a right vested in the obligated person. Again, it is the duty of an executioner to kill a person condemned to death. But the execution of such duty also gives him the right to behead the person sentenced to death by decapitation. But we need not offer this explanation. We believe that all such provisions of law as are repugnant to Islamic Shariah are null and void.

(378) Married Adulterer

According to the Shariah a married adulterer is liable to stoning to death and an unmarried adulterer to flogging. Obviously, stoning to death is a punishment entailing the loss of offender's life and serves as an example to those married persons who are not adulterer, while the punishment of flogging does not involve the adulterer's loss of life. The purpose of flogging is to chastise the unmarried adulterer and warn others. As the punishment of stoning is a death penalty and a prescribed punishment *(hud)*, the married adulterer will be treated as vulnerable.

Imam Malik, Abu Hanifa and Ahmed are agreed that the killer of a married adulterer is not liable to *qisas* and *diyat*, for the killing of such an offender is lawful on account of the crime of adultery. Now as punishment of adultery is a *hud* and under the Shariah the punishment of *hud* can neither be delayed nor remitted the killing of married adulterer is obligatory as well as indispensable for eliminating evil and enforcement of the *huds* laid down by Allah.[1]

1. (a) *Hashya-al-Tahtawi.* Vol.4, p.260
   (b) *Mawahib-ul-Jaleel.* Vol.6 p.231 and 233.
   (c) *Al-Mughni* Vol.9., p.186.

The predominant view of the Shafi'ee School is in harmony with the foregoing position. But according to a view held by a minority of the jurists of the same school, the killer of a married adulterer would be liable to death penlty or *qisas* because he kills the offender for the sake of someone else and not for his own sake, for it would be like killing of the killing of the killer of victim by a person other than the victim's heir or guardian[1] incurring thereby the mandatory punishment of *qisas*. This view may be rejected on the ground that killing of married adulterer is lawful for all individuals and for any definite person to the exclusion of others and that killing of such offender is imperative, involving no choice. On the contrary, killing of a killer is lawful only for the heir or guardian of the victim and he too is allowed the choice between killing and forgiving.

Although the killer of a married adulterer is not guilty of any offence, yet he may be liable to apprehension on the ground of encroaching on the powers of competent authority[2] provided that the authority in question is exercising the power vested in him. But if the competent authority has abandoned his duty in this respect then the person carrying out the duty cannot be apprehended on the ground of encroaching on the power of the authority in question.

As regards a married adulterer, the Shafi'ites lay down the condition that he should have legal safeguard, for a vulnerable person cannot be allowed to kill another vulnerable person. Thus a married adulterer cannot take the life of another married adulterer or of apostate or Harbi.

All of them occupy the same position and be killed with impunity.[3]

But if anybody kills an unmarried adulterer without mistaking him for someone else, he will be treated as wilfully guilty of murder and will be held for committing it. The reason for this is that he kills a person whose life is not lawfully open to attack. Jurists of all the four schools are unanimous on this point.

1. *Al Muhazzab.* Vol.2. p. 186.
2. *Tabsiratul-Hukkam.* Vol.2. p. 170.
   (a) *Tahafat-ul-Muhtaj,* Vol.4, p. 10.
   (b) *Sharh-ul-Ansari Alal Behja,* Vol.5. p.3 and 4

However, if an unmarried person is murdered, being taken for someone else, the killer, according to Imam Malik, Imam Abu Hanifa and Imam Ahmed will not be liable to punishment. The verdict of Hazrat 'Umar (R.A.A.) may be cited in this context:

"One day as Hazrat 'Umar was having his meal when a man came to him running with a bloody sword in his hand and sat down beside the Caliph. Some people presently arrived chasing up the man. They said that the fellow had killed his wife along with one of their men. Hazrat Umar asked the man if their allegation was true. The man replied that he had cut off the thighs of his wife and if any person was between her thighs, he had killed him too. Hazrat 'Umar then turned to the men who had pursued him and questioned them about what the accused had stated. They said that the accused chopped off the thighs of his wife with his sword and as the sword fell between her thighs their man had also been cut as under. Having heard them, Hazrat 'Umar turned to the accused and said: "If these fellows behaved again in the same manner you should do the same again." The Caliph then declared the murdered person to have been liable to unculpable homicide.

The jurists of Islam attribute homicide in the case of adultery to heat of emotion caused by the wounded sense of honour. The killer is overwhelmed by the emotion and compelled to commit the crime. But these jurists differentiate between a woman known and related to the killer and one who is a stranger. They hold that if the woman with whom adultery is committed is a stranger to the killer, then taking her life by him is not warrantable. But if she is related and known to him, killing of the person committing adultery with her is justified; for in the case of a stranger female, one is not so overwhelmed by the sense of dishnour as one is in the case of, say one's wife, mother or sister.

But majority of jurists hold that justification of killing an adulterer is not the heat of emotion resulting from the sense of dishonour but active elimination of evil by killing the unmarried adulterer in the very act of adultery and that very individual is under the obligation to do so. The jurists advocating this view do not discriminate between a woman known to the killer or one unknown to him and treat the murder of a married adulterer in

action as lawful. Most of the jurists belonging to the three Schools hold the same opinion.

But Imam Shafi'ee advocates quite a different view. According to him killing of an unmarried adulterer in the act of adultery is not justified unless it is not possible to make him desist therefrom. If he is killed without any attempt to stop him, his murder will be a capital crime and the person committing it will be treated as guilty of culpable homicide. The Imam argues that heat of emotion caused by the sense of dishonour does not warrant killing, nor is such killing in a bid to eliminate evil is justified unless no other alternative is left.[1]

Besides, some jurists belonging to the school of Imam Shafi'ee hold that killing of an unmarried adulterer is not warrantable until penetration. If penetration takes place he is guilty of fornication. These jurists consider it lawful to kill the adulterer in the very beginning in order to stop evil.

With the jurists of Islam it makes no difference in the case of adultery whether the adulterer is killed after the court passes judgment in view of the establishment of the charge against him or before the court's judgment. What matters is that offence of the adultery is proved in the manner prescribed by the Shariah. If it is so proved, then the killer of the adulterer will not be accountable and if not, the killer will be accountable as guilty of wilful murder.

The modern laws in force are out of tune with the Shari'ah with regard to the punishment of adultery. They do not provide death penalty for adultery; nor do they lay down that every kind of adultery is punishable as does the Shariah. The Egyptian penal law follows the laws in force in non-Muslim countries. But the relevant provisions of the Egyptian law do not prejudice the provisions of the Shariah in this respect. In fact, they are totally null and void on account of their repugnance to the Shariah. Only those provisions of the said law are valid which accord with the principles of the Shariah. We have already dwelt on this point at length and need not discuss it here again.[2]

1. (a) *Al Muhazzab*, Vol.2. , p. 186.
   (b) *A'lam*, Vol.6. p.26.
2. The reader is referred to article No. 191.

As every individual according to the Shariah is under the obligation to kill a married adulterer, this obligation falls under the category of personal rights on the grounds explained in the context of the obligation imposed on every individual to kill an apostate. By personal rights we mean those for which provision exists in the Egyptian penal law. By touching on this point we do not aim at justifying the murder of a married adulterer on the ground that it is obligatory under the Shariah. What we mean is to indicate the discrepancy inherent in the provisions of the Egyptian law. On the one hand these provisions do not lay down any punishment for killing an apostate or adulterer as authorized by the Shariah. This may be seen from article No.7 of the Egyptian penal law. On the other hand, they declare killing of vulnerable person unlawful as may be seen from article No 230 of the said law. The reason for this discrepancy is that the Egyptian legislature knows nothing about the rights and duties of individuals as provided for in the Islamic Shariah.

(379) (IV) Maharib (Aggressor)

A Maharib according to some jurists is one who causes corruption, sheds blood and commits robbery in the land. Some jurists regard a dacoit as a Maharib.

More then one punishment have been laid down for haraba or offences committed by a Maharib.

Says Allah:

> "The only reward of those who make war upon Allah and His Messenger and strive after corruption in the land will be that they be killed or crucified or have their hands and feet on the alternative sides cut off or be expelled out of the land." (5:33)

Thus the offence of *harba* entails the punishments of death, hanging, amputation of hands and feet on alternate sides and banishment. What is most striking about these punishments is that all of them do not involve loss of life.

The jurists differ on the question whether the order of above punishments is based on the quantum of punishment or whether they admit of choice. This difference of opinion has arisen out of the use of conjunction 'au' meaning (or) in the above verse.

Some of the Jurists hold that 'au' signifies order and amplification, while others think that it signifies option.

The Schools of three Imams Abu Hanifa, Shafi'ee and Ahmed take the position that punishments correspond to the nature of respective crimes in the order given by the Qur'anic verse. The order of punishments is this that the *maharib* who commits murder without grabbing any property will be put to death; the maharib who takes property but does not commit murder will have his limbs amputated, the *maharib* who commits both murder and robbery will be put to death and[1] hanged and *maharib* who poses a threat to the wayfarers but neither commits murder nor takes property will be banished.[2]

According to Imam Malik, if a *Maharib* commits murder, killing him is obligatory. In such a case the ruler or the person in authority is not allowed the choice to order his banishment or amputation of his limbs. The only choice open to him is either killing or hanging the *Maharib*. If the *Maharib* just grabs the property of the victim without taking his life, the person in authority is not competent to banish him. He is given the choice between putting the offender to death, hanging him and cutting off his hands on alternate sides. If the offender just poses a threat to the way farers the person in authority is allowed the choice between putting the offender to death, hanging him and cutting off his limbs. By choice the School of Imam Malik means the discretion or individual judgment of the authority. For instance, in the case of a *Maharib* being a man of understanding, *ijtehad* (analogical reasoning) requires that he should be killed or crucified, because by merely cutting off his limbs he cannot be deterred from causing harm. If the *Maharib* is not a man of understanding but is bold and powerful, his limbs should be amputated. But if he is neither a man of understanding nor a bold and stout fellow, it will be proper to banish or award him penal punishment.[3]

1. Imam Abu Hanifa is of the view that there is no hitch in cutting off the limbs as well as killing of a murderer cum robber. Imam Abu Yousuf and Imam Muhammad do not agree. But according to one opinion Imam Ahmed subscribes to the view of Imam Abu Hanifa on this point.
2. (a) *Al Mughni.* Vol.10, p.3 and 4.
   (b) *Asna-ul-Matalib* Vol.4. p.154 and 155.
   (c) *Bada'e-wal-Sanae'*, Vol.7 p 93.
3. *Bedqyat-ul-Mujtahid* Vol. 2, p. 382.

Haraba is a *hud* crime. A *hud* constitutes a punishment which as a rule, must be promptly applied and which cannot be nullified by remission. But punishments for *haraba* are an exception to this rule. They are nullified by repentance. Says Allah:

> "Save those who repent before you overpower them. For know that Allah is Forgiving, Merciful." (5: 34)

So if a *maharib* repents, he becomes exempt from the punishments of killing, crucification, amputation of limbs and banishment, provided that he repents before apprehension. If he does so before apprehension punishment will not be nullified.[1]

It may be inferred from the foregoing statement that the *maharib's* state of vulnerability is amenable to change because of the difference of opinion among the jurists as to whether punishments for the *haraba* as laid down in the divine decree are arranged in an order corresponding to the offences or are dependent on the choice of the person in authority. Thus if we say that the (order in which the punishments have been laid down, then the life of a *maharib* guilty of homicide and robbery would be vulnerable. In the case of robbery alone his right hand and left foot will be liable to amputation. Posing threat to way farers is a *haraba* that does not warrant death penalty or the sentence of amputation of limbs. It is punishable by banishment which does not involve loss of life. however, if we interpret the punishments in question as involving choice on the part of the authority, then in the ease of capital crime, life of *Maharib* will be vulnerable, for homicide is punishable by killing or hanging and either of these punishments involves loss of life. The same injunction applies to murder and robbery. But if *Maharib* robs but does not kill the victim, only his right hand and left foot will be open to amputation, inasmuch as the Imam can also sentence him to death or hanging as well as to the amputation of limbs, which is the least punishment. But if the offender simply creates scare on the thoroughfare his life or limbs will not be vulnerable. Although the person in authority is competent to sentence him to death or the amputation of limbs, yet has the choice to banishment as well which does not entail loss of life."

1. (a) *Al Mughni,* Vol. 10, p. 315.
   (b) *Bedayat-ul-Mujtahid.* Vol.2. p. 382.

In this case, too, the offender will be treated as vulnerable right from the time of committing the offence and not at the time of conviction. One may draw the conclusion from this general rule that with the jurists believing in choice with regard to punishments of *haraba*, the state of offender's vulnerability is amenable to change. Thus if the offender only commits robbery but is subsequently sentenced to death, his limbs are vulnerable following the commitment of the offence but following conviction his life becomes vulnerable. Again, in the case of *Mahrib* who terrorizes the wayfarer and is consequently sentenced to death or amputation of limbs he is wholly or partially secure at the time of committing the offence but is wholly or partially vulnerable following conviction.

If the *Maharib* repents before being apprehended, he will cease to be vulnerable and the guarantee of his security will be restored. If anyone aware of the offenders repentence kills him or cuts off his limbs he will be guilty of wilful murder or amputation of limbs. But if the agents does it without having knowledge of the offenders repentence he will be treated as inadvertently guilty of murder or amputation as the case may be.

But prior to repentance, killing of a *Maharib* or cutting off his limbs is obligatory. This is because punishments of *haraba* constitute *hudood* and any delay in their execution is unwarrantable. Besides it is incumbent on every individual to carry out *hudood* and assumption of responsibility to execute *hudood* by the ruler or person in authority does *annul* the obligation imposed on every individual except when the *hudood* are actually applied.

If anyone kills or cuts off the limbs of a vulnerable person then the public authority may punish him but not as a murderer or one guilty of amputation of limbs but as one guilty of encroaching on the jurisdiction of such authority provided that the authority in question applies the *huds* in accordance with the Shariah.

If the *Maharib* who is partially vulnerable as is the case when he robs someone without killing him and is murdered by a third person, the murderer will be accountable for wilful homicide. If the third person in question cuts off the offender's limb other than the one subject to amputation, he will be held as wilfully guilty of cutting off the wrong limb. If he cuts off the wrong

limb by mistake he will be treated as inadvertently guilty of amputation of limb.

However, in case if the *Maharib* dies as a result of the amputation of the right limb, the agent will not be accountable for any offence, for death results from the amputation of a limb whose cuting off is obligatory under the Shariah and fulfillment of an obligation is not qualified by considerations of security.

(380) (V) Rebel

A rebel is the person who works for toppling the established government or for the overthrow of the people in authority or one who relying on his own power, refuses to obey the established government. Rebellion[1] is an offence directed against the government or the rulers and not against the social order. If it is directed against social order, it is not rebellion. It amounts to causing turmoil in the land. Evidently, the social order of the Muslims is nothing but Islam.

The jurists of Islam have laid down certain conditions of the crime of rebellion, which have already been touched on.[2] An important condition is that the rebels try to justify their rising and possess the necessary resources and power to achieve their objective. This is the position taken by one set of jurists. Another set of jurists lay down the condition that the rebels assemble at one place to achieve their end and cease to obey the government.

When the conditions of the crime of rebellion are fulfilled, the life of rebel becomes insecure. Hence whoever kills a rebel, kills one who can lawfully be killed and who is liable to punishment. As long as the state of rebellion persists the rebel remains vulnerable.

Imam Abu Hanifa hold[3] that the life of rebels becomes vulnerable as soon as they assemble at one place and cease to abide by the law in force, while the three Imams Malik, Shafi'ee and Ahmed lay down the condition of starting war and commission of aggression by the rebels to be declared vulnerable. According

1. See article No78.
2. See article No.78.
3 (a) *Al Behr-ul-Raiq*, Vol. 5, p. 142.
(b) *Boda'e-wal-Sanae'*, Vol.7, p.236.
(c) *Sharh-ul-Qadeer*, Vol.3, p. 411.

to the principle laid down by the three Imams killing of rebels is unlawful unless they start a war by launching an attack.[1]

Killing of rebels is obligatory under the Shariah. Says Allah:

"Fight that party which doeth wrong till it return unto the ordinance of Allah." (49:9)

This duty is imposed on every individual. If the person or persons in authority entrust the task of quelling rebellion to some people, others are not absolved from carrying out duty in question., As long as rebellion continues, this duty remains effective.

The public authority is not competent to call the killer of a rebel to account, as killing him is lawful. But the authority may punish him for taking the law into his own hand provided that authority itself is engaged in discharging the duty in question and has appointed certain people to perform it.

(381) Offender Liable to Qisas

Qisas as provided for in the Shariah is the punishment for wilful murder and wilfully causing injury. The every meaning of *qisas* is to punish the offender in the same manner as he does wrong. *Qisas* is both a prescribed punishment and one involving loss of life. It is applied to life as well as to parts of body. When applied to life it amounts to killing and as applied to the parts of body it amounts to the amputation of parts of body or causing injury.

If anyone commits an offence entailing *qisas,* he would incur vulnerability in proposition to the wrongful act he is guilty of.

In the case of *qisas* vulnerability is relative. The offender is vulnerable only to heir of the victim. His life is immune from the rest of the people. The reason for the relativity or vulnerability in the case of *qisas* is that *qisas* is a right and not an obligation. The life or body of the offender will be vulnerable to the person possessing such a right and it is up to him to decide whether to exercise his right or not. For this reason, in the case of murder only the heir of the victim can lawfully take the life of the murderer.

1. (a) *Mawahib-ul-Jaleel,* Vol.6, p.278.
   (b) *Al Igna,* Vol. p.293.
   (c) *Al Muhazzab.* Vol.2, p. 236.

If any person other than the victim's heir kills the accused he will be guilty of wilful homicide, even if the accused is sentenced to *qisas* because he kills one who is lawfully immune from him and also because it is possible that the heir of the victim forgives the offender and the execution of the sentence of *qisas* is consequently stopped.[1] This is the position taken by the majority of jurists.

The general rule of the Shariah is that the establishment of *hudood* and the enforcement of punishments is the duty of public authority. But *qisas* is exception to this rule, since in the case of *qisas* it is the heir of the victim who enforces punishment.

All the jurists are agreed that heir of the victim has the right to carry out the sentence of *qisas* in person and also to fix the time thereof once the sentence is passed provided that it is carried out under the supervision of the person in authority and that the heir of the victim is capable of executing the sentence in a better way. If he is not capable of executing it, or executing it in a better way, he should appoint an agent to it for him, who is not only capable of executing the sentence but can do it in a better way. There is no hitch in assigning the task to a government functionary who is appointed to perform it as his duty.

As regards the punishment of *qisas* lesser killing, the jurists differ. The position of Imam Shafi'ee and Imam Malik, supported by one of the opinions held by the Hamblite school is that the heir of the victim can on no account execute the sentence of *qisas* lesser than killing in person even if he is capable of doing it in a proper manner. For he is not sure with all his best intentions in respect of the offender that he will not commit irretrievable excess against the offender in performing the job himself. The task of *qisas* in such a case should be assigned to an expert who can accomplish it in the best possible manner. Imam Malik observes that the task of retaliation for wounds should be entrusted to two just persons and that if two such persons are not to be found then one would suffice provided that he is really a just person.[2]

1. *Al Mughni.* Vol.9, p.356.
2. (a) *Mawahib-ul-Jaleel,* Vol.6, p.253-254.
   (b) *Al Muhazzab,* Vol.2. p. 197.
   (c) *Al Sharh-ul-Kabeer,* Vol. 9. p.399.

The view of Imam Abu Hanifa as subscribed to by some of the Hamblite jurists is that the victim is vested with the right of doing the act of *qisas* for injuries or amputation of part of his body if he can exercise this right in a proper manner. But if he is not capable of doing it properly he should assign the job to an agent who has the experience of carrying out *qisas* sentences. The jurists of the Hamblite school who subscribe to the position taken by Imam Abu Hanifa do not see any harm in appointing a special functionary to execute the sentence of *qisas* on behalf of every person who cannot perform the job himself in a proper manner and that such a functionary should be paid salary out of the *bait-ul-Mal* or public treasury.[1]

The right of *qisas* bestowed upon the aggrieved person or his heir owes its origin to the following divine injunction:

> "Whoso is slain wrongfully, we have given power unto his heir but let him not commit excess in slaying." (17:33)

The person deserving *qisas* may exercise his right within prescribed time after the sentence of *qisas* is passed.

The Shariah does not only provide for the right of the victim's heir to retaliation, but also for his right to forgive. He is permitted to relinquish *qisas* in lieu of compensation. If the heir of the victim remits the punishment of *qisas*, there will be no *qisas*, but the public authority may award the offender a proper punishment other than execution.

The Shariah tries to persuade the heir of the victim to relinquish *qisas* in more than one way. For instance, the person forgiving the offender is permitted to relinquish *qisas* in lieu of compensation. He is also assured of a reward in Hereafter as well as the pleasure of Allah. Says Allah:

> "Whosoever pardoneth and amendeth his wage is the affair of Allah." (42:40)

Again,

> "And those who ..... are forgiving! Allah loveth the benevolent." (3:134)

1. (a) *Bada'e-wal-Sanae'*, Vol. 7, p. 246.
   (b) *Al Sharh-ul-Kabeer*, Vol. 9, p. 398-399.

The Shariah looks upon forgiving as Allah's Kindness. Says Allah:

According to a Tradition narrated by Hazrat Anas, whenever a case of *qisas* was presented to the Holy Prophet, he exhorted the aggrieved party to pardon the offender.

Some people think that conferring the right of *qisas* on the heir of the victim is actually the revival of a primitive custom which was practised by the tribes living in the jungle. But this idea is without any foundation. The Shariah has not revived a primitive jungle custom by allowing the right of *qisas* to the heir of the victim. It has actually provided for this right in response to the demands of human nature as well as the interests of both individuals and that community, as it has done in laying down all the other principles, rights and duties.

There can be no denying of the fact that the urge to retaliate is instinctive. However refined men's nature and however disciplined his instincts may be, he craves to retaliate in person the wrong done to him. There can also be no two opinions as to the fact that if it is in a man's power to get what is due to him, he is naturally inclined to forgive and forget in good faith.

It is also an established fact that *qisas* is in the interest of the community; for homicide alone can deter homicide and retaliation alone ensures the security of life. Again, it is also an acknowledged fact that by relinquishing the right to *qisas* in good faith peace and tranquillity and the safety of public life is guaranteed and the incidence of crime is consequently reduced.

The Islamic Shariah grants the right of *qisas* to the heir of victim in person in view of the demands of human nature and on the established universal principles mentioned above so that the urge to revenge latent in the depths of human heart may be gratified and the person wronged may be deterred from enforcing his right before the judgment of the court or the time fixed for the execution of sentence or dissatisfied with the punishment awarded by the public authority, to take revenge on the family of the killer.

In short it is on these grounds that the Shariah confers the right to *qisas* on the victim's heir. The Shariah first makes it

possible for the heir to retaliate the death of the murdered person and has thus brought the killer within the reach of the victim's heir. But at the same time it advises the heir to pardon the offender. It persuades him not only from the material point of view to pardon him in lieu of compensation but also by the spiritual attraction of Allah's pleasure and the promise of the reward to be enjoyed in the Hereafter so that the person forgiving may do so in good faith and animosity may be replaced by friendship and goodwill. This exactly is the sprit which ensures maintenance of peace and tranquillity between human groups. Following pardon by the aggrieved party, the public authority may award the offender any punishment other than death penalty.

The aim of the Shariah in bestowing the right of *qisas* on the victim's heir is to purge the inner self, resolve the dispute between rival parties, maintain peace and security, reduce the incidence of crime, prevail upon the people to respect the law, deter them from giving vent to vindictive passion, to assure the people of the security of life and forestall the possibility of excess in the application of death penalty.

According to the three Imams Abu Hanifa, Shafi'ee and Ahmed the right to *qisas* is divisible. It follows from this that if some of the victims heir relinquish the right of *qisas*, others too will be deemed to have relinquished it. On the contrary, Imam Malik holds that the right in question is indivisible. It may, therefore, be concluded that unless all the heirs relinquish the right, the offender cannot be pardoned. If one of them pardons him, others do still have the right to *qisas*.

The simple way to exercise the right to *qisas* is that when the offender is convicted and the time to carry out the sentence of death is fixed, the victim's heir is to translate the sentence into action, in person, or have it carried out by his agent. In such a case the heir is obviously not accountable for his action nor does his action constitute an offence because he will be exercising the right bestowed upon him by the law-maker.

But it is possible that the heir of the victim is so usually unruly that he kills the offender before that he is condemned to death or before time fixed for execution. Similarly it is possible

that the heir of the murdered person relinquishes *qisas* under the influence exerted upon him, but later changes his mind and carries out the sentence of *qisas*. It is also possible that some of the heirs remit the punishment of *qisas* but others exercise their right to *qisas*. Also the possibility of retaliation by some of the heirs cannot be ruled out, who exercise their right without consulting other heirs, although the latter are in favour of pardoning the offender. The question arises whether in all such cases the person availing himself of the right to *qisas* is to be treated as one within his right or guilty of an offence, or whether he will be liable to punishment or exempt from it. We propose to discuss now the injunctions pertaining to such cases. First we take up the case of murder and then proceed to deal with offences other than murder.

(382) (I) Injunction Regarding Killing of Offender

(a) *Killing prior to passing sentence and time fixed for execution.* If the heir of the victim kills the offender who is liable to be put to death in retaliation, he will not be liable to capital punishment even if he kills the offender before he is formally condemned to death or before time fixed for his execution. The reason for this is that he does a lawful act by exercising the right bestowed upon him by the Shariah.

However, he will be liable to punishment for his hasty action in exercising the right before the time fixed for the purpose and thereby encroaching on the power of the competent institutions. These institutions may award any penal punishment to him which they may deem fit.[1]

The heir of a murdered person would not be liable to capital punishment for killing the offender before passing of death sentence provided that the charge of homicide against the offender is established. But if the charge is not proved the heir of the victim will be treated as guilty of wilful murder.

In other words, if the charge of murder against the accused is established, it will be immaterial if the heir of the victim kills him before he is convicted. The reason for this is that in the case

1. (a) *Mawahib-ul-Jaleel*, Vol.6, p. 233.
   (b) *Sharh-ul-Behja*, Vol.5, p.3.

of *qisas* the right of retaliation is vested in the victim's heir as the result of mere commitment of murder and not as the result of the offender's conviction. Therefore, if the victim's heir takes the life of the offender before his conviction, he will be exercising his right to *qisas*, which is established right at the time of murder.

This problem presupposes the singularity of the victim's heir or the agreement of more than one heir on *qisas* or their determination not to relinquish *qisas*.

(2) Killing After Remission

The three Imams Abu Hanifa, Shafi'ee and Ahmed are of the opinion that the right to *qisas* stands invalidated on account of its relinquishment by some or all of the heirs, inasmuch as *qisas* cannot be split up. They argue that relinquishment by one or some of the heirs would be tantamount to the remission of a part of *qisas*, which is impossible because the same person cannot be partly killed and partly kept alive. On the basis of this principle Imam Abu Hanifa and Imam Ahmed opine that the heir of the victim who is not willing to remit *qisas* and kills the offender knowing that the other heir or heirs have already remitted it is guilty of murder and is lible to the punishment of *qisas* himself. Imam Shafi'ee on the other hand maintains that this problem is twofold. In the first place the court decides to pardon the offender and rescind *qisas*. In such a case if the victim's heir kills the offender he must be sentenced to *qisas*. Secondly, in case if the victim's heir kills the offender before the court decides to rescind the punishment of *qisas*, the heir will be subject to the same injunction as applies to the case of an heir who kills the offender without obtaining permission of other heirs. In such a case some jurists treat the heir liable to *qisas* while others would have him pay diyat.[1]

If the victim's heir does not know that other heirs have pardoned the offender and consequently kills him, such an heir

1. (a) *Badae'-wal-Sanae'*, Vol. 7 p. 248.
   (b) *Tuhfath-ul-Muhtaj*, Vol.4, p. 26.
   (c) *Al Muhazzab*, Vol.2, p. 117.
   (d) *Al Mughni*, Vol.9, p.466.

will be accountable as one guilty of homicide, but by virtue of his ignorance of the fact that other heirs have pardoned the offender, he will be absolved from liability to *qisas*. But according to Imam Abu Hanifa and Imam Ahmed the killer will be liable to payment of diyat. The school of Imam Shafi'ee holds two divergent views in this respect. According to one view the killer will be liable to *qisas* while according to the other view he will have to pay diyat. Those who favour *qisas* argue that relinquishment of *qisas* invalidates the heirs right to it. It is therefore, incumbent upon the heir to ascertain before exercising his right whether or not such right exists. The advocates of diyat take the position that in the case of *qisas* the right of the victim's heir is unquestionable and it remains intact. Therefore, if any of the heirs kills the offender having the knowledge of the remission of *qisas* by other heirs but believing that his own right to *qisas* is intact, he will get the benefit of doubt and will be exempt from liability to the punishment of *hud*. Imam Malik is of the view that remission is indivisible. It will be treated as valid only when all the heirs of the victim entitled to *qisas* remit it. Therefore if one of the heirs relinquishes it the right vested in others will not be rescind. It so being the case the heir who kills the offender in spite of the remission of *qisas* by others, will not be criminally accountable. The reason for this is that remission in such a case does not hold good and does not affect the right of the particular person in question. But if the act of the person exercising the right to *qisas* interferes with the powers of authority he will be liable to *tazeer*.[1]

(3) If one or a few heirs of the victim kill the murderer without obtaining permission from the rest of the heirs, they will be accountable for homicide on criminal grounds. With the exception of Imam Malik, all the jurists are unanimous on this point. However, they differ on the question of the punishment to which such heirs would be liable. Imam Abu Hanifa and Imam Ahmed do not support *qisas*, inasmuch the heirs in question are partially entitled to the life of the victim's killer. As this gives rise to doubt, the heirs killing the offender would be exempt from the punishment of *hud*. They will, therefore, be liable to

1. *Al Mughni*, Vol.9, p. 466.

payment of diyat instead. Majority of the Shafi'tes subscribes to this view. But some of them take the position that *qisas* will be obligatory because only one or some of the victim's heirs are not vested with he right to *qisas*. They suppose by way of illustration that a whole group kills the victim and every member of the group kills only a part of him. Nevertheless every member is subjected to *qisas*. The answer given to this argument is that an accomplice is not liable to *qisas* because he kills a part of the victim but because he kills the whole of him.

Some jurists argue that the victim's heir will be liable to *qisas* because he kills the whole of the offender whereas he was not entitled to only a part of him. He would be entitled even to a part of the offender's life only when he acquires the right to the entire life of the offender with the concurrence of all the heirs. If any of the victim's heir is not in favour of executing the punishment of *qisas* the killer's entitlement to a part as well as the whole of the offender's life would lapse. For *qisas* is not amenable to division and, therefore, whoever kills the murderer takes his whole life without any entitlement. The reason is that unwillingness on the part of the rest of the heirs to execute the sentence of *qisas*, invalidates the killers right to *qisas*. If one has no right to the whole of a thing he has no right to a part thereof.[1]

According to Imam Malik the victim's heir incurs no punishment at all by killing the murderer. He holds that the killer exercises his right which consists in *qisas*.[2] The three Imam's view excluding Imam Malik's is based on the position that the consent of all the heirs is necessary for the execution of the *qisas*. sentence; for anyone of them may remit it; whereas the basis of Imam Malik's standpoint is that *qisas* is not invalidated by the remission by anyone of the heirs; it is rather invalidated when all the heirs entitled to *qisas* relinquish it. It so being the case, the heir killing the murderer exercises his lawful right to *qisas*.

(4) Killing of Offender by Remitting Heir

The heir of victim who kills the offender having remitted

1. (a) *Bada'e-wal-Sana'e*, Vol.7, p.273. (b) *Al Muhazzab*, Vol.2, p. 197.
   (c) *Al Muhazzab*, Vol.2, p.197. (d) *Al Sharh-ul-Khabeer*, Vol.9, p. 386 and 387.
2. *Al Sharh-ul Khabeer lil Durdeer*, Vol. 4, p. 212.

qisas will be accountable for culpable homicide. The jurists unanimously[1] treat him as one willfully guilty of murder and liable to *qisas* himself, whether he remits the death penalty of the offender in lieu of compensation or without compensation.[2] For remission is a guarantee of the offender's security of life.

(5) Dismemberment of Offender's Limb

If the victim's heir dismembers a part of murderer's body and then remits *qisas*, he will, according to Imam Abu Hanifa and Ahmed, have to pay diyat for the dismembered part of the murderer's body; for by dismembering the part whereto he has no right, he incurs penalty; and as Imam Abu Hanifa maintains he does not have the right to amputate any part of the murderer's body and will, therefore, be accountable for amputating it unwarranted as he does have the right to kill the murderer but not to amputate a part of his body. It may be conjectured that murderer's life should have been taken as *qisas* but as *qisas* stands invalidated on account of doubt, it is of necessity, replaced by diyat. Doubt in this case arises on the ground that loss of a part of body is governed by the loss of life. But as the right of the victim's heir to a part of the murderer's body cannot be established until the murderer is killed, the right of the killer to a part of his body is also evident by implication after he is killed. But in case if the murder is not killed, the victim's heir has no right to any part of the murderer's body either in principle or by implication. We, therefore, come to the conclusion that by dismembering a part of the murderer's body the heir in question oversteps the limits of his right.[3]

Imam Shafi'ee, Imam Abu yousuf and Imam Muhammad maintain that if an heir of the victim amputates any part of the offender's body and relinquishes *qisas*, he will not be accountable on criminal ground. But if he does not remit *qisas* he will be

1. Unanimity here refers to the consensus of all the four major Imams whereas Hazrat Imam Hasan's (R.A.A.) verdict is that the killer is liable to payment of diyat and according to Hazrat 'Umar bin Abdul Aziz such a killer is to be awarded *ta'zeer* or penal punishment.
2. (a) *Bada'e-wal-Sana'e*. Vol.7, p.247. (b) *Al Muhazzab* Vol.2, p. 197.
   (c) *Al Mughni*, Vol.9, p.461. (d) *Hashyath-ul-Tahtawi* Vol.4, p. 258.
   (e) *Nihayath-ul-Muhtaj* Vol.7, p. 286. (f) *Al Sharh-ul-Kabeer* Vol.9, p.391.
3. (a) *Al Mughni*, Vol.9, p.461. (b) *Al Bahr-ul-Raiq*, Vol. 8, pp. 319-320.

liable to *ta'zeer*, because he has already disfigured a part of his body before killing him. The ground of absolving the victim's heir from blame of amputating a part of the murderer's body in case he remits the capital punishment is that he destroys only a part of the whole and he has the right to do so; for whoever enjoys the right of destroying the whole has a right to destroy a part thereof.[1]

But Imam Malik maintains that the victims heir will be liable to *qisas* in case he destroys or cuts off a part of the murderer's body whether or not he already relinquishes the capital punishment to which the murderer is liable; for until the offender is killed, the amputation of his hand would entail *qisas* and the injuries caused to him would incur penalty.[2]

(383) Retaliation in Cases other than Murder

If an offender incurs *qisas* in cases other than homicide such as causing injury or amputation of a part of body viz.; hand, finger or ear, he will be impunitively vulnerable to the extent he incurs *qisas*. However, in case if the person vested with the right to *qisas* amputates any part of the offender other than the part corresponding to the one for which retaliation is lawful, he will be treated as intentionally guilty of cutting off the wrong part. But for cutting off the right part he will not be accountable. He will nevertheless have to account for encroaching on the powers of competent institutions and for making undue haste in retaliation. In case if any person other than one having the right to *qisas* cuts off, the right part of the offender's body, such a person will be accountable for criminally amputating the part, inasmuch as the offender is innocent in relation to such a third person. The offender is treated impunitively vulnerable to the victim or his heir.

If the rightful retaliator amputates the right part of the offender's body at the time fixed for the purpose or before such time and the offender dies of the wound, the retaliator will not be accountable for his death because it results from a lawful act that is from exercise of the right to *qisas*. This is the positions

1. (a) *Al Muhazzib*, Vol. 2, p.202. (b) *Bada'e-wal-Sanae'*, Vol. 7, p.304.
2. (a) *Mawahib-ul-Jaleel*, Vol. 6, 235.
(b) *Al-Mughni*, Vol.9. p. 319. (c) *Al Mudawwana*, Vol.16, p. 222

of the three Imams Shafi'ee; Abu Yousuf and Muhammad. These jurists argue that such a death occurs in consequence of an act which the retaliator is within his right to do. That is the reason why it is no offence. The result of a lawful act is also lawful. But Imam Abu Hanifa holds that the rightful retaliator will be accountable for quasi-wilful murder. He maintains that the lawful act consists of only amputation of the right part of offender's body and the right of retaliation is confined to that act. But in the case of offender's death the retaliator oversteps the lawful limit of retaliation and is therefore accountable for homicide.[1]

According to Imam Malik the person having the right to retaliation should not himself do the act of *qisas* in retaliation for the amputation of a part of offender's body, but he is nevertheless entitled to retaliation. The Malikites do not lay down any penalty for the consequence of lawful retaliation; nor do they hold the retaliator accountable for the such consequence. Therefore if the rightful retaliator himself amputates the part of the offender's body and the offender dies in consequences of the act of retaliation; the retaliator will not be accountable for such consequence. He will, however have to account for encroaching on the powers of competent institutions.

The injunctions bearing on murder and its various cases stated above also hold good in cases of injury and amputation. It is, therefore, not necessary to repeat them.

(384) (VII) Thief

The person guilty of such larceny as necessarily entails amputation of hand is impunitively vulnerable to the extent of a hand, while all the other parts of his body are immune. The cause of vulnerability is that amputation of hand involves a destructive punishment and as such is an obligatory ***hud*** which does not admit of choice of remission. In other words the ***hud*** of amputation of hand is not a right but an obligation which every individual must need fulfil, although competent institutions may reserve the right of executing this *hud*. The obligation remains intact until it is actually discharged.

1. (a) *Al Mughni*, Vol.9, p.443. (b) *Al Muhazzab*, Vol.2, p.200.
(c) *Tuhfat-ul-Muhtaj*, Vol.4, p.28. (d) *Bada'e-Wal-Sana'e*, Vol.7, p.305.

What follows from the above statement is that any person cutting off any limb of a thief which needs must be cut off as an obligation will not be liable to punishment for such act inasmuch as he amputates a limb impunitively vulnerable and discharges a duty imposed by the Shariah. If competent institutions are themselves performing this duty, they are not empowered to punish the above person as one guilty of amputating the thief's hand. However, they may punish him for encroaching on their jurisdiction.

If anyone cuts off a thief's hand before the charge of larceny is proved, which is nevertheless established later on, he will not be accountable for his act. But in case the charge of larceny is not proved then the person in question will be accountable.

If the wound caused by the amputation of hand infects the whole body and the thief dies the person amputating the hand will not be guilty as of murder as long as he is not accountable for the act of amputation. But should he be accountable for such act he will be treated as one wilfully guilty of murder. In other words, if his act of amputation does not involve accountability, he will be absolved from accountability for the death resulting therefore, for death is the consequence of the mandatory act of amputation and there is no condition of security for doing a mandatory act.

According to Imam Abu Hanifa the difference between amputation and *qisas* is as follows. The latter is the right of one who is entitled to it and right involves choice between availing himself of it or relinquishing it, the latter course of action being preferable nonetheless. Moreover, Imam Abu Hanifa attaches the string of the security of the offender to the exercise of a right. But amputation of a limb for larceny is a duty as it constitutes a *hud* to be enforced by every individual as an obligation, although the public servant is vested with a special right to discharge the duty in question. Besides, it is necessary to ignore the consequences of the enforcement of a *hud* so that the execution of *hudood* may not be suspended or delayed.

The jurists of the Shafi'ee School are of the opinion that the person amputating the limb should not himself be an offender whose limb is declared vulnerable. This position may be attributed

to one of the principles they have laid down under this principle a vulnerable person is immune from a person vulnerable like himself. The principle in question is applied exclusively by the Shafi'ites. Some of them, however, take the position that the thief is immune to all the persons other than the aggrieved person. It is only the latter who has the right to amputate the thief's hand. But this view is held only by a minority of the above school.[1]

Sixth Category

The Rights and Duties of Officials

(385) The Duties of Officials

The Shariah imposes certain duties on the public authority and the responsibility of discharging those duties rests with the public servants, who are appointed by the government in such a manner that they perform the duties assigned to them according to their ranks. Thus if a public servant does anything in the due discharge of his duties, he will not be accountable for it on criminal grounds, even if the act he does is one forbidden by the Shariah. For instance, homicide is forbidden to everybody, but the public servant is authorised to kill anyone in order to enforce punishment. Enforcement of punishment does not constitute transgression. It is the duty of the court to pass a sentence and the executive is duty bound to carry out that sentence. Similarly, issuing orders or flogging offenders and implementing such orders are the duties of the public servants appointed for the purpose. The Qazi who passes such orders or a law-enforcing agency which implement them is not to be called to account for flogging. Although subjecting anyone to physical violence is a prohibited act as such, but so far as a Qazi is concerned, he is duty-bound to pass the order of flogging. He has simply no choice between passing the order of flogging and dispensing with it.

A general principle of the Shariah is that when a public servant discharges his duties within prescribed limit he is not to

1. *Sharah-ul-Behja*, Vol. 5, p.3.

2. The officials as members of the Ummah have the same rights and duties as other members. But in their official capacity they have specific rights and duties. In this Section we propose to discuss only the latter.

be held responsible for whatever he does in due discharge thereof. But if he intentionally oversteps those limits, he will be criminally accountable for such act. However, if he deems it proper to do such act in the due discharge of his duty and does it in good faith, he is not to be called to account for any violation of the criminal law of Islam.[1]

Execution of *hudood* also falls within the purview of the general rule under discussion. The jurists are unanimous that establishment of *hudood* is a duty. If the due discharge of this duty or the execution of *hudood* within the prescribed limits results in the loss of offender's life or limbs, the person establishing the *hudood* will not be held responsible; for discharge of duty is not qualified by consideration of security. The obligated person must need perform his duty. For instance, suppose someone applies the *hud* of adultery to an unmarried person and scourges him with a hundred stripes in the prescribed manner. The offender consequently dies. In such a case the person scourging him will not incur any blame. But if he scourges the adulterer with more than a hundred stripes intentionally or unintentionally, thereby killing him, he will, in either case, be accountable on criminal grounds. In fact he will have to account for excessive stripes as intentionally or unintentionally guilty as the case may be, even if the offender survives. But in case if the Imam or the person in authority orders the offender to be scourged with more than hundred stripes and the agent being unaware of the unlawfulness of the stripes in excess of one hundred or believing obedience of the Imam to be incumbent upon himself, he is not to be blamed for the consequence of his act. It is the Imam who will be accountable for transgression. But in case, if the agent carrying out he Imam's order is aware of the unlawfulness of excessive stripes, he will have to account for transgression. The Imam's order does not warrant his esculpation.

Another case wherein the same general rule is applicable is that if the Imam intentionally transgresses, he will be subjected to *qisas*. Thus if he kills anybody without justification, he will

1. (a) *Al Mughni*, Vol.10, p.334.
   (b) *Sharh Fathul Qadeer*, Vol.4, p.217, 218 and 251.
   (c) *Asna-ul-Matalib*, Vol.4, p. 163.

be killed in retaliation, or if he wrongfully amputates the limb of anyone, his own limb will be amputated in the like manner whether he does the wrongful act himself with his own sword or causes such a wrongful act to be committed by his agent whom he wrongfully orders to kill a person or amputate his limb.[1]

The Imam will be accountable for his mistake just as he is accountable for committing a wrongful act wilfully. However, the jurists differ on the question of penalty in the case of mistake. Some jurists are of the view that penalty is due from the Imam and his family because it is incurred by the mistake he commits and the accountability for it is similar to that of anyone doing a wrongful act by mistake. But there are others who hold that penalty for the mistake of an official is to be imposed on the *bait-ul-mal* (Public Treasury). The reason for this is that the person in authority often commits mistakes and if penalty is imposed on him he and his family will be over-burdened. Moreover the Imam acts for the community and not for himself.[2]

The rule mentioned above is applied by Imam Malik, Abu Hanifa and Ahmed in cases of *ta'zeer* also. They maintain that if an official awards penal punishment or *ta'zeer* to a person which results in the latter's death the official will incur no punishment or penalty, whether the punishment awarded by him is capital punishment or one other than capital punishment such as flogging. The basis of the position taken by the three jurists is that the person ordered to be punished incurs the sentence and its execution by his own criminal act and penal punishment in his case is indispensable in the interest of the security of both the individuals and the community as a whole and that discharge of duty is not qualified by considerations of security provided that the person on whom the duty is imposed discharges it within the limits laid down by the Shariah and does not intentionally or inadvertently over-steps those limits.[3]

1. (a) *Sharh Fathul Qadeer*, Vol.4, p. 160-161.
   (b) *Al Muhazzab*, Vol. 2. p. 189.
   (c) *Al Sharh-ul-Kabeer*, Vol.9, p. 342-343.
   (d) *Mawahib-ul-Jaleel*, Vol. 6, p. 57.
   (e) *Al Mawwaona*, Vol. 16, p. 57.
   (f) *Al Umm*, Vol. 6, p. 170-171.
2. (a) *Al-Mughni* Vol. 10, p. 228.
   (b) *Al-Muhazzab*. Vol.2, p. 228.
   (c) *Al Umm* Vol. 2, p. 170-171.
3. (a) *Al Mughni*, Vol.10, p.334 and 335.
   (b) *Sharh Al -zurqani* Vol. 8, p. 116.
   (c) *Sharh Fathul Qadeer*, Vol.4, p. 212 and 213.

Imam Shafi'ee, however, maintains that person in authority is responsible for the payment of diyat for the life of the offender who dies as the result of penal punishment awarded by him or who is sentenced to death by him as penal punishment; for the person in authority may exculpate the offender or remit his punishment and is also under the obligation to award punishment commensurate with the circumstances of the offender and the kind of offence committed by him. Since the very purpose of penal punishment is to chastise and not to kill the offender, his security must need be taken into consideration in the choice of such punishment. Hence if the person in authority awards the offender capital punishment or a punishment resulting in his death, he will be responsible for the payment of penalty for awarding such wrong punishment.

The *hud* prescribed for drinking alcohol is forty stripes. According to Imam Shafi'ee stripes in excess of the prescribed number would fall within the province of penal punishment. If the Imam or the person in authority gives a drunkard more than forty stripes and the drunkard consequently dies the person in authority will be held responsible for the death of the sinner, for punishment in excess of forty stripe constitutes penal punishment or tazeer which presupposes the security of the person ordered to be flogged.

Accountability of the person in authority for penal punishment leading to offender's death, is justified by Imam Shafi'ee on the basis of a remark made by Hazrat Ali (R.A.A.). He is reported to have observed:

> "If anyone dies after getting the punishment of *hud*, my mind is not troubled by any misgiving except in the case of punishment for drinking, because the Holy Prophet (S.A.W.) has not prescribed *hud* for such offence."

Hazrat Imam Shafi'ee cites another case to justify his position in this context:

Hazrat 'Umar (R.A.A.) summoned a woman who was expectant. She was so frightened that she miscarried, Hazrat Ali (R.A.A.) advised Hazrat Umar to pay the penalty for her miscarriage and he took the advice.

Imam Shafi'ee further argues that the Holy Prophet (S.A.W.) did not declare penal punishment obligatory in every case, and in the case of penal crime he pardoned the crime as well as remitted the punishment.[1]

The position of the three Imam's Malik, Abu Hanifa and Ahmed as opposed to Imam Shafi'ee's view is in harmony with the principle applied by the man-made laws in force.

But the view advanced by Imam Shafi'ee has its own advantage. It guarantees social benefit for the heirs of the person getting punishment of death. According to this view the heirs of the person killed as the result of penal punishment is to get compensation, because he dies in consequence of a punishment which does not aim at putting him to death. Obviously the compensation requires to be paid to the heirs of the offender would be a support for his family and ensure the proper education of his offspring.

(386) The Rights of Officials

Under the Islamic Shariah the officials share all the rights enjoyed by individuals of the Ummah. However in their capacity as rulers, they are also vested with the right to command the individuals and issue orders to the individuals to obey their command. The right of the officials and corresponding duty of the individuals has been described in the following verse of the Holy Quran:

> "O ye who believe! Obey Allah and obey the Messenger and those of you who are in authority; and if ye have a dispute concerning any matter refer it to Allah and the Messenger." (4:59)

The right of command and the duty of obedience are qualified by conformity to the Shariah. The command of the person in authority should not be inconsistent with the provisions of the Shariah while the person subject to his command should not obey him in contravention of the Shariat injunctions, whether such a person is an employee or an ordinary citizen. This is manifest from the following divine decree:

1. (a) *Asná-ul-Matalib*, Vol.4, p. 163. (b) *Sharh-ul-Bahjah*, Vol.5, p. 108.
(c) *Al Muhazzab*, Vol.2, p. 228.

"And if ye have a dispute concerning any matter, refer it to Allah and the Messenger." (4:59)

There is also the Holy Prophet's verdict in the matter:

"No created being should be obeyed in violation of the Creator's command."

There is another saying of the Holy Prophet (S.A.W.) to the same effect:

"If any officer orders you to do aught in disobedience of Allah, do not carry out his order."

It may be inferred that according to the Shariah the command of a person in authority is no guarantee to exempt the person subject to such a command from accountability or violation of the Shariat injunction, even if the person in question is an employee serving under the officer. If the head of the state or person in authority orders the person under his command to do something incompatible with the Shariah and the said person does it, knowing that he is doing something wrong, he will be liable to punishment. In such a case the obedience of the ruler is not incumbent upon the ruled. Nor is the ruler's command obligatory for the latter. The reason for this is that the ruler is not competent to issue such an order, nor is the ruled authorized to execute it. Should he execute it he will have to account for his act.

In case if the person subject to the command of an officer or authority is not aware of the illegitimacy of the act he is ordered to do and he does it in obedience of the authority, he will be absolved from accountability for doing it in good faith, provided that the act is attributable to the person in authority, inasmuch as the person subject to command is to obey his officer only in matters other than those which are unlawful.[1]

If the person in authority forces someone under his command to kill or scourge a third person and the victim consequently dies, the person in authority and the man under his command both will be responsible for the murder of the victim on criminal grounds. Reluctance does not warrant exemption of the agent even if it amounts to duress. For according to the principle of Shariah unwillingness on the part of a person to commit murder

1. (a) *Al Sharh-ul-Kabeer*, Vol.9, p.342 and 343.
(b) *Asna-ul-Mutalib*, Vol.5, p.7. (c) *Sharh-ul-Zurqani*, Vol.8, p. 10.

is no justification for his exemption from punishment. If duress to which an unwilling person is subjected does not warrant his exemption, moral pressure is much the less justification for it. In short according to the Shariah no person in authority occupies the position to order an act inconsistent with the Shariat provisions and the man under him to carry out that order.

If the person in authority is under the impression that the act ordered by him is legitimate but the man under his command does not believe in its legitimacy and yet carries out the order in question, then the latter will be accountable for such an act instead of the person in authority.

It makes no difference whatsoever whether the person under the command of an officer is in military service or a civilian, for no quality of the subordinate servant lends legitimacy to any unlawful act committed by him and no quality of the person in authority empowers him to order an unlawful act, however high office he may be holding.

(387) The Shariah and the Modern Law Compared

The provisions of Shariah pertaining to the governor's right of giving orders and the execution of those orders by the governed are in harmony with those of the modern laws. However, these laws draw a line of distinction between the military personnel and the civilians. They disallow disobedience of officers on the part of the former, whereas a civilian under the modern laws, may oppose the person in authority in such matters as he demand illegal.

The Islamic Shariah, on the contrary, declares totally unlawful every such act of obedience as falls within the province of crime, whether the person governed is in military service or a civilian. As viewed from this angle of vision, the concept of the Shariah is obviously superior to that of the modern laws; for it emboldens the person governed to speak the truth and tread the right path, compelling the governor thereby to refrain from giving orders inconsistent with the Shariah and creating a situation wherein there will be nobody to obey him. It is evident that it is the concept of Shariah which ensures the good of both the governor and the governed.

D. Grounds of Exemption from Punishment

(388) Grounds of Annulment of Punishment

There are four states wherein the offender is exempt from punishment:

(a) Duress (b) Unconsciousness (c) Insanity (d) Minority.

In all the above four states an offender commits the same criminal act as is unlawful and punishable under the Shariah. But the law-maker exempts him from punishment on the basis of the offender's state and not on that of any attribute of the act itself. In other words the springs of punishment lie in an attribute to be found in the person of the offender, as opposed to the grounds of legitimacy which is constituted by an attribute of the act nullifying its prohibition. On this basis we may differentiate between the ground of exemption from punishment and the ground of legitimacy. The springs of exemption lie in an attribute of the agent and of legitimacy in an attribute of the act.

We now proceed to discuss the question of exemption in each of the above states, separately.

Duress

(389) Meaning of Duress

Some of the jurists define duress as commission of an act by a person in a state wherein his consent is neutralized and which does not involve his choice. According to another definition duress refers to an act emanating from the oppressor and imposed upon the person under compulsion in such a manner that he is coerced into committing the act. According to a third definition duress is the threat of something disagreeable for getting an act done by the agent without his consent.[1] Some jurists maintain that the threat so held out involve something harmful and painful to a human-being[2] There is yet another set of jurists who offer a different definition of duress. According to them duress means that the person who is capable of exercising it holds out a threat of such an immediate punishment that a sensible person agrees

1. *Al Behr-ul-Raiq,* Vol.8, p. 179.
2. *Mawahib-ul-Jaleel.* Vol.4, p. 45.

to commit the act he is compelled to do and believes that if he does not do it, the person intimidating him will translate his threat into action.[1]

(390) Kinds of Duress

There are two kinds of duress. The one kind of duress is the state wherein both the consent and the choice of the agent is neutralized, i.e., wherein the life of the agent is threatened. This kind of duress is known duress proper. The other kind of duress is the state wherein the agent's consent is neutralized but his choice remains unaffected. This kind of duress does not pose a threat to the life of the agent. It is for example, the sort of compulsion amounting to confinement for a certain period or subjecting the agent to physical violence which does not pose a threat to his life. This kind of duress is termed as duress imperfect.[2]

Duress imperfect affects those matters which require the consent of the agent such as transactions of sale and purchase, doing a job for which remuneration is to be received or acknowledgement of something. The imperfect duress has no force in crimes.

Duress proper affects any act which requires both the consent and the free choice of the agent; for instance, commitment of offences. If the agent is compelled to commit adultery he should be subjected to duress to such an extent that both his consent and choice are done away with. We will deal with duress proper in the sequal.

A minority of the jurists belonging to the Hamblite School maintains that duress must involve torture such as striking, stifling twisting the calf of the leg etc. But mere threat of torture is no duress. These jurists substantiate their position with reference to an incident in which Hazrat Ammar bin Yasir was involved.

The heathens took away Hazrat Ammar bin Yasir by force and compelled him to profess belief in polytheism. Hazrat Ammar refused to comply. Thereupon, the heathens seized and plunged him into the water. He was about to die for lack of breath and consequently did as the heathens bade. Later he went to the Holy

1. *Asna-u-Matalib and Hashia-tul-Shahal Ramali,* Vol. 3, p.282.
2. *Al Behrul Raiq.*

Prophet (S.A.W.) with tearful eyes. The Prophet (S.A.W.) wiped his tears and said: "The heathens plunged you into the water and demanded to profess belief in polytheism and you did accordingly. If they compelled you in future, do the same thing again."

They also cite Hazrat 'Umar's edict: "The person whom you starve, strike or leave lying with his limbs bound, is not the master of his own self."

The sum and substance of the view advocated by these jurists is that the essential condition of duress is transgression which forces the person under duress to agree to do the desired act. If no duress practically takes place and if duress is absent before the commission of the act which the agent is compelled to do, then the agent according to these jurists, is not to be treated as under duress.[1]

The predominant position of the Hamblite School is identical with that of Imam Malik, Abu Hanifa and Shafi'ee i.e. intimidation in itself is duress. In most cases duress constitutes the threat to torture, kill, strike etc; for the punishment already suffered would not prevail upon the agent to commit the act he is compelled to do and after being subjected to the punishment it will be meaningless to be afraid of such punishment. What one is actually afraid of is the torture with which one is threatened. When one is subjected to such torture, one is no longer frightened by it. In short, the agent can be compelled to agree to the commission of act by the threat of torture, but the torture already inflicted will not compel him to agree.

It follows from the above discussion that duress is both practical and inherent. Practical duress is that wherein threat and intimidation has been translated into action while inherent intimidation is that wherein threat and intimidation is apprehended.

(391) Conditions of Duress

There are four essential conditions of duress. In the absence of these conditions there can be no duress, nor can the agent be under duress:

1. (a) *Al Mughni*, Vol.8, p. 261. (b) *Al Bahrul Raiq*, Vol.8, p.80.
(c) *Asna-ul-Matalib*, Vol.3, p.282 and 283.
(d) *Mawahib-ul-Jaleel*, Vol.3, p.45 and 46.

(1) Threat should be serious prospective of great harm and neutralizing the agents consent; as for example murder, grievous injury, long confinement. But a harmful threat is something subjective which varies with persons and circumstances. For instance, the same threat may constitute duress for one person and may not for another. So is it also the case with the nature of circumstances: One person may stoically bear several stripes while a single stripe may be too much for another person; one person may have patience enough, bear long confinement, while a single night's confinement may be an immense torture for another. Moreover, in the case of murder, threat of beating and confinement is not treated as duress whereas in the case of drinking and larceny it constitutes duress. Again, in the case of a person who can easily suffer physical violence an ordinary blow is no duress, whereas an ordinary blow to respectable and esteemed people constitutes duress; for a blow is tantamount to their insult and causes irreparable damage to their honour and reputation.

Jurists are unanimous that threat of railing, vituperation and calumination is no duress.[1]

The order of a competent authority will in itself be treated as duress whether it involves threat or not provided that such order implies punishment of death, grievous injury or imprisonment for the disobedient. But in the case of an order given by an official who is not vested with necessary powers, it will not be treated as duress until the person under his command is sure that if he does not carry out the order, the means of duress will be applied to him or that the official in question is in the habit of applying such means when his orders are defied.[2]

The command of husband to his wife is of the same order as the command of a person in authority, provided that the wife is apprehensive of duress in the case of disobedience on her part. But if she does not fear that the husband would subject her to duress and yet she obeys him, then her case involves no duress.[3]

If the threat held out concerns the person under compulsion himself it is duress. The jurists are unanimous on this point. But

1. (a) *Al Mughni*, Vol.8, p. 261 (b) *Mawahibul-Jaleel*, Vol.4, p.45.
2. *Hashia Ibn Abideen*, Vol.5, p. 112.
3. *Hashia Ibn Abideen*, Vol.5, p. 112.

if it concerns people other than the person under compulsion, opinions vary. According to the Malikites such a threat constitutes duress although it bears upon persons other than one intimidated.[1] Some of the Hanafites would not treat it as duress, while other Hanafites hold that if the threat relates to the son or father or someone closely related, it constitutes duress. This is identical with the position of the Shafi'ee school.[2]

The Hamblites opine that if the threat concerns the father or the son, it constitutes duress.[3]

According to Imam Malik, Shafi'ee and Ahmed intimidation to destroy property also constitutes duress, provided that the property it concerns is substantial. If it is of small value, such intimidation would be no duress. The quantum or value of property is relative to the person and his status; what may consists of relatively small quantity to one person may constitute a great quantity for another.[4]

According to the principle of the Hanafite school threat to destroy property is no duress, even if the destruction of property cause a great loss to the owner; for according to the Hanafites the object of threat are persons and not property. But some of the jurists belonging to this school do treat threat to property as duress. Even the jurists of this group differ on the question of treating threat to property as duress. Some of them consider threat or destroying the entire property to be duress, while others do not regard threat to entire property as an essential condition of threat. They are of the view that intimidation to destroy such part of the property whose destruction may involve substantial loss to the owner does constitute duress.[5]

The object of intimidation must be a prohibited act. If the act is lawful then the agent will not be treated as under duress. For example, a person is sentenced to flogging and imprisonment,

1. *Mawahibul Jaleel*, Vol.4, p. 45.
2. (a) *Hashia Ibn Abideen* Vol.5, p.110.
   (b) *Asna-ul-Matalib and Hashia-al-Shahab-al-Ramali*, Vol. 3, p. 283.
3. *Al Iqna*, Vol.4, p. 4.
4. (a) *Mawahib-ul-Jaleel*, Vol.4, p. 45. (b) *Asna-ul-Matalib*. Vol.3, p. 283.
   (c) *Al Iqna*, Vol.4, p.4. (d) *Al Mughni*, Vol.8, p. 261.
5. *Al Bahrul Raiq*, Vol. 8, p. 82

he is subsequently threatened to be subjected to these punishments if he does not commit such and such offence. Accordingly the offender does as he is told. He will then be flogged and imprisoned and will not be treated as one under duress; for the punishment with which he is threatened is legal and, therefore, the offender will not be deemed to have agreed to commit the offence under threat but deemed to have willingly committed it.[1]

(2) The threat should be of immediate nature. It should be such a threat that if the person under duress does not do the desired act at once, it will be translated into action immediately. If the threat does not require immediate action, it will not be deemed a threat, since it will allow the person under compulsion time enough to make arrangement for his protection. Besides a threat which does not require immediate compliance does not compel the agent to commit the act immediately. Immediately or non-immediacy of the act the agent is threatened to commit depend on the circumstances and expectations of the agent under duress.

(3) The person holding out threat must be capable of putting it into practice. Duress must need involve the power to carry out threat. If he is incapable of it, his threat will be no duress. It is not necessary that the person threatening the agent should be an authority as an officer or public servant. The reason is that the person in question should be powerful enough to carry out what he threatens to do.

(4) If the person under duress believes that if he does not perform the act he is threatened to do, the threat held out to him would be carried out. But if he believes that the person subjecting him to duress is not serious and that he can escape the punishment with which he is threatened, and nonetheless he commits the act, he will not be treated as one under duress. However, it is necessary that the conjecture of the person threatened rests on cogent grounds.

(392) Injunction Pertaining to Duress

The injunction relating to duress varies with the nature of crimes. In some cases duress is not effective at all. In certain

1. (a) *Hashia Ibn Abideen*, Vol.5, p.120.
   (b) *Asna-ul-Matalib* Vol.3, p.282. (c) *Al Mughni* Vol.8, p.260.

other cases criminal accountability is annulled and the criminal act becomes lawful. In other cases still, although criminal accountability remains intact, yet punishment is nullified. In short, crimes fall under three categories with reference to duress.

(a) *Crimes unaffected by duress.* They do not become legitimate acts, nor admit of leniency because of duress.

(b) Crimes which become legitimate acts under duress and are as such no longer crimes.

(c) *Crimes admitting of leniency.* They are treated as offences alright but do not incur punishment.

(393) Crimes unaffected by Duress

All the jurists agree that in the case of an offence consisting of murder, amputation of limbs or causation of grievous injury, punishment is nullified by duress proper. This is substantiated with reference to the following divine injunction:

> "Slay not the life which Allah has made sacred, save in the cause of justice. (VII:152)

Again,

> Those who torture believing men and believing women undeservedly, they bear the guilt of slander and manifest sin. (33:58)

The reason given by the jurists for the punishment of a person committing murder under duress is that he kills the victim wilfully and wrongfully, believing that he will thereby be able to save' his own life and guard himself against the malignancy of the intimidator.

It is clear that according to the jurists of Islam, duress makes every crime or leniency in its punishment permissible, save capital crime or any wrong that kills the victim. They are unanimous that duress does not affect the punishment for murder or any fatal offence. They, however, differ on the nature of punishment. Thus Imam Malik and Imam Ahmed hold that the person committing murder under duress will be liable to *qisas*. The jurists belonging to the School of Imam Shafi'ee advocate two different views on this question. The predominant view favour

1. (a) *Mawahib-ul-Jaleel*, Vol. 6, p.242.
   (b) *Al Mughni*, Vol. 9, p. 331. (c) *Al Iqna*, Vol.4, p.171.

qisas, while the other view prescribe diyat on the ground that duress introduces an element of doubt which would invalidate the punishment of *qisas*.[1] The Hanafites also disagree on the nature of punishment. Imam Zafar is in favour of *qisas* while Imam Abu Hanifa himself and Imam Muhammad regard as sufficient penal punishment, which the judge may deem fit. Imam Yousuf on the other hand prescribes diyat for the offender committing murder under duress.[2]

The position of jurists of Islam as to murder, amputation of limbs and fatal injury is in effect in harmony with the view of the materialists among the pundits of modern law. These pundits hold that in the state of duress two claims and two interests come into clash. The agent has either to choose between the crime and the danger posed by the threat held out to him or self-sacrifice or the sacrifice of someone else. If he chooses a lesser sacrifice, say feeds a hungry man with a loaf he acquires by force, he will not be liable to any punishment. But if the conflicting interests are equal or if he chooses greater sacrifice between the two, then he will be punished.[3] This view was applied to an incident which took place in England. We relate it, in brief:

A ship sank and only three people on board survived. They included the captain, a member of the crew and a servant. They boarded a boat and left themselves at the mercy of the sea, suffering great hardships for eighteen days. The captain and his companion then killed the servant and gratified their hunger and thirst with the flesh and blood. The court which heard their case first sentenced them to death and then commuted the sentence into life imprisonment.

(394) Cases wherein Offences are Warrantable

Duress absolves the agent from accountability for any act permitted by the law-maker in the state of duress; for example acts like eating the flesh of carion and drinking blood. Says Allah:

1. (a) *Tuhfat-ul-Muhtaj*, Vol. IV, p.7.
   (b) *Al Muhazzab*. Vol.2 p.189.
2. *Badae'-wal-Sana'e*, Vol. VII, p. 179.
3. *Al Mabsooat ul-Janaiya*, Vol.1, p. 492.

"Allah hath explained unto you that which is forbidden unto you, unless ye are compelled thereto." (6:120)

"But he who is driven by necessity, neither disobeying nor transgressing, it is no sin for him." (2:173)

Eating of the flesh of carion or drinking blood is forbidden under all circumstances but duress. However, if the agent is compelled, such acts become permissible for him and he is absolved from accountability for them. Although such acts are essentially unlawful, yet in the state of duress they cease to be tabooed. In fact, the predominant opinion of the jurists is that a person will be committing a sin if he does not save his life by eating under duress what is forbidden; for abstaining from a forbidden thing under duress would be tantamount to imperil one's life.[1]

The sort of compulsion that absolves the agent from criminal accountability is duress proper. But under imperfect duress a forbidden act does not become permissible. It will rather remain forbidden and punishable.

Forbidden acts that do not incur criminal accountability may be ascertained from the injunctions which declare them unlawful. If certain acts have been described as warrantable under duress in such injunctions, they fall under the category of such forbidden acts and the other way about. At any rate, acts declared permissible under duress and pressure of necessity relate to forbidden edibles and drinks such as carion, swine's flesh, blood and unclean liquids.

As for alcohol, the jurists hold divergent views. Thus Imam Abu Hanifa, Ahmed and Shafi'ee maintain that drinking alcohol under duress is exempt from punishment but the act in itself does not become legitimate. It will continue to be unlawful but the agent will be exempt from punishment because he ceases to be a free and responsible agent under duress.[2]

1. (a) *Mawahib-ul-Jaleel*, Vol.6, p.308.
   (b) *Tabsirat-u1-Hukkam*, Vol.2, p.227.
   (c) Books referred to in foregoing footnote.
2. (a) *Mawahib-ul-Jaleel*, Vol.6, p. 242.
   (b) *Al-Mughni*, Vol.9, p. 33.
   (c) *Al Iqna*, Vol. 4, p. 171.

Criminal Accountability of Agent under Duress in case of above Offences:

The rule is that no one is accountable on civil and criminal grounds for doing a lawful act and since in the case of above offences a forbidden act assumes the character of legitimacy, the agent is not personally accountable for such act even on civil grounds. However, if another act doing harm to someone is committed along with such act, the agent is accountable on criminal grounds. Suppose for example that the agent eats swine's flesh which is forbidden as such but is permissible under duress. In such a case if he pays for the swine's flesh, he commits no offence, nor is he, therefore, accountable. But if he eats the flesh by forcefully acquiring it from a non-Muslim or steals it from him, then the agent will be accountable on civil grounds and will have to pay penalty to its owner. Here the reason for accountability is not eating of the swine's flesh but usurping or stealing it. But in the case of duress both usurpation and theft incur no punishment. Nevertheless, exemption from punishment for both the offences does not absolve the agent from civil accountability.

(395) The Shariah and Modern Laws Compared.

The difference between the Shariah and the modern laws on the point discussed above is that under the Shariah certain forbidden acts become permissible under duress, while according to the modern laws a forbidden act does not assume the character of a lawful act under duress but only cease to be punishable. The position is that the number of forbidden acts which become permissible according to the Shariah are very limited.

The acts in question are essentially forbidden because they are harmful to the agent. For instance, drinking of alcohol, eating of carion or swine's flesh does harm to the agent's health and this is why they have been prohibited. Obviously prohibition of these things are in the interest of the agent himself and not anyone else. Therefore if abstinence from them is more harmful to the agent or the wisdom of prohibition is void, then justice demands that they should be allowed. Apart from the acts referred to above, the prohibition of all the other acts is not based on consideration

of personal good. They prejudice other people's weal, whether such acts are committed by the agent on his own accord or under duress. Hence in both the cases any such act would remain a crime; But as the agent commits it under duress, he is exempt from punishment.

The logic of the Shariah is, perhaps, more subtle than that of the modern laws; for these laws treat all crimes at par and do not take into account the basic difference of prohibition. For instance, eating the meat of an animal slaughtered outside the slaughter-house is a punishable offence.[1]! Prohibition of such animal's flesh perhaps presupposes the probability of the animal suffering from an epidemic which may sicken the consumer. It so being the case, if anyone being compelled by hunger eats the flesh in question, his act under the said Egyptian law would ail the same be treated as crime, in spite of the fact that if prohibition is valid even in the state of compulsion the consumer may lose his life. The Egyptian law contents itself with rescinding punishment in a case like this, whereas there is no cause of prohibition whatsoever. In short whatever measure the Shariah adopts in opposition to the modern laws, it does fulfil all the requirements of justice and logic.

(396) Crimes Exempt from Punishment on Grounds of Duress

With the exception of crimes mentioned above, punishment for all offences is invalidated because of duress although the acts constituted by them remain unlawful. The reason for this is that the person under duress does not commit such an act willingly; nor does he has full freedom to choose. In the absence of choice and discretion, the agent incurs no accountability and, therefore, no punishment either. In other words remission of punishment concerns the agent and not his act. That is why he is exempt from punishment while the act remains forbidden.

However, the agent is exempt from punishment on condition that he is subjected to duress proper. If duress is imperfect, he will not cease to be liable to punishment. Besides, material duress and inherent duress are equal.

1. Shambles Act, Article I.

The category of crimes under discussion includes false accusation, vituperation, larceny and destroying property belonging to someone else. Thus if the agent is compelled to commit any such offence, he will not be liable to punishment. Says Allah:

> "Save him who is forced thereto and whose heart is still content with Faith." (16:106}

But despite exemption from punishment all such acts which constitute as crimes would continue to be prohibited in accordance with the Prophet's edict:

> "It is incumbent upon every Muslim to respect every other Muslims right to life, property and honour."

The opinions of the jurists, however, vary as to adultery committed under duress. Imam Abu Hanifa originally held that no male can commit adultery without erection and, therefore, erection is the proof of concupiscence and choice. It so being the case, an adulterer cannot be treated as one under duress and will, off necessity, be liable to punishment. But Imam Abu Hanifa later recanted his view for erection is the evidence of potency and not of freedom of choice.[1] Some of the jurists representing the schools of Imam Malik, Shafi'ee and Ahmed subscribe to the original view of Imam Abu Hanifa. But they are only a few and their position is of secondary importance. Predominant opinion of all the three schools is that duress invalidates the punishment of the agent to commit adultery; for intimidation and threat aims at the renunciation of adultery and the act itself is not the cause of fear. In this case, therefore, there is no obstacle to erection.

The jurists are unanimous that a woman under duress is not liable to punishment as the Holy Prophet has declared.

> "My Ummah has been exculpated from mistake, lapse and anything done under duress."

This principle continues to be effective right from the days of the Prophet. It is reported that a woman was raped in Prophet's lifetime; He absolved the woman from the *hud*. In the case of woman, material duress, i.e. subduing her by material force and

1. *Badae'-wal-Sanae'* Vol.7, p. 180.
2. *(a) Mawahib-ul-Jaleel*, Vol.6, p. 294. (b) *Tuhfat-ul-Muhtaj*, Vol.4, p. 91. (c) *Al Mughni*, Vol.10, p.158-159.

inherent duress i.e. intimidation etc are both alike. In this connection the following verdict is often quoted:

A woman who was extremely thirsty asked a herdsman to give her water. The herdsman agreed on condition that she would gratify his sexual appetite. The woman did accordingly. The case was referred to Hazrat Umar (R.A.A.) who in his turn consulted Hazrat Ali (R.A.A.). Thereupon the latter gave the verdict that the woman acted under compulsion and was, therefore, not liable to punishment and substituted his judgment by citing the following divine injunction.

> "But he who is driven by necessity neither craving nor transgressing, it is no sin for him."

Hazrat Umar (R.A.A.) accordingly remitted her punishment.

Injunction relating to Accountability.

In the case of crimes falling under this category, the person acting under duress will be accountable for losses caused to others because of the offence he commits, although he will not be liable to punishment; for according to the principle of the Shariah violation of the rights to life and property is forbidden and cannot be justified by any plea under the Shariah. That is why the agent who does an act under duress will have to compensate the losses caused to others by him in order to save his own life and avert any possible damage to himself.

The Shariah in this respect is in agreement with the modern law, and, for that matter, is not at variance with the Egyptian statute. Thus a provision exists in the Egyptian law to the effect that if a person is compelled to commit an offence in order to save himself and avert any serious danger facing him which he does not cause himself and cannot ward off otherwise he will be exempt from punishment.

Under the modern laws in force the person acting under duress though not liable to punishment will be accountable on civil grounds for any loss caused to others by his act as is provided for in the Shariah also.

(397) The Basis of Shariah Concept of Duress

Hitherto we have been discussing the basis of the state of

duress which invalidates punishment. We proceed now to take up other states of duress. From a study of the views expounded by the jurists it appears that duress suspends the consent of the agent but not his choice. A person acting under duress is not absolutely bereft choice. His choice in such a state is of course disturbed and its sphere is narrowed to such an extent that the agent is to choose between two alternatives: he has either to commit the crime or fall himself a prey to the wrong threatened by the intimidator. As criminal accountability hinges upon free choice of the agent, it will cease to be effective when free choice is suspended. According to what has been stated above, free choice is not totally suspended because of the narrowing down of its sphere of operation. As a matter of fact an element of choice does exist in a state of duress.

If the agent under duress commits the offence, he will do harm to the victim but if he chooses to refuse to commit, he will have to undergo the punishment threatened and will thus come to harm himself. But the Shariah does not approve of both these courses of action. It prohibits both doing harm to others and to imperil one's own safety. Thus duress amounts to a choice between two harmful and forbidden acts. To cope with such a situation Shariah lays down two rules. The one is that one harm should not be warded off by another harm. This means that it is improper to deter one harm by a similar harm. For instance, if a person's land is being submerged, he is disallowed to save it by inundating another person's land; or if his property is being destroyed, it will be improper for him to save it by destroying another man's property. Again, if a person is reduced to starvation, it does not become warrantable for him to eat the food belonging to another person in similar condition. The other rule is to accept a lesser harm in order to ward off a bigger one. This rule requires that when one cannot help committing either of two harmful acts, one should not choose to do the act which is more harmful of the two. When the two foregoing rules are applied, the person under duress can do only one of the two acts and in doing that one act he ceases to be a free agent. He must need do the act in question firstly under duress and secondly in conformity to the rule of the Shariah. In other words when the agent acting under duress observes

the above two rules, he totally loses his freedom of choice and in consequence, thereof he is also absolved from criminal accountability and thus ceases to be liable to punishment. No freedom, no punishment. But if anyone wards off a damage by a greater damage or a similar damage in contravention of the above two rules of the Shariah, he will be treated as a free agent, and because of his freedom of choice he will neither cease to be accountable for his act nor cease to be liable to punishment, however limited his freedom may be.

The Shariah brings to bear the above principles in a very subtle manner. Thus according to the injunctions of Shariah a person under duress may kill another person, cut off his limbs or inflict fatal injury on him only when he has to deter an attempt on his life or a fatal wound likely to be inflicted upon himself of any attempt to amputate his limbs by the latter. He is not allowed to deter a damage by a similar or greater damage. If he does so, he would be treated as a free agent and would as such continue to be accountable for his act and liable to punishment for murder, infliction of fatal injury or amputation of the victim's limbs.

Apart from the foregoing crimes no other offences like the use of abusive language, adultery, destruction of property cannot be equal to the threat of taking life. That is why if the agent commits any such offence under duress, he will not be treated as preventing a damage by a similar damage. It is rather deterence of a greater damage by a lesser one. Owing to the injunction of the Shariah the agent has no choice between the two damages. It so being the case he would be acting under duress as he has no alternative left. Therefore he will neither be accountable for committing the offence, nor liable to punishment.

(398) The Islamic Shariah and Modern Laws Compared

We have discussed the position of the Shariah with respect to the problem of duress. Any body acquainted with the modern laws in force also knows that both the modern concepts of personal duress and material duress are incorporated in the Shariah with the difference that the Shariah has sifted them out of their flaws, while retaining all their merits.

The modern pundits of law advocating the personal doctrine

maintain that the basis of duress is the neutralization of the agent's choice whereas those supporting the material doctrine treat the agent under duress as free and contend that the presence or absence of free choice cannot be the basis of duress. They hold that in the state of duress two interests or rights are in conflict and that this conflict demands the sacrifice of the right or interest which is less in value than the other. If the value of the interests or rights is equal or the value of the one is greater than the other, then according to the view of some of the materialists the offence involving greater damage than the damage involved by duress would be punishable. But there are other advocates of the materialistic view who do not believe in punishment at all, since an offence committed in such a case and the offender committing it is of no consequence to the society. This position obviously is not satisfactory and does not provide any legal basis for the justification of the offence.[1]

(399) Duress and Necessity

According to the relevant injunction of the Shariah the state of necessity is also associated with duress. But it is different from the latter in respect of its cause, because in the case of duress the agent is compelled to do an act by someone else, who commands him to do it against his will, while in the state of necessity the agent is not compelled by anyone, but is placed in a predicament and in order to come out of it and save his own life or the life of someone else he must need commit the forbidden act. For example suppose some people board a boat that is overloaded with cargo and consequently the board begins to sink. In such a situation the only way to save the people aboard is to throw some of the cargo into the river in order to decrease the load.

Extreme hunger and thirst are similar examples of necessity. For if a person suffering from extreme hunger and thirst cannot fulfil his want by fair means he will die. So he is compelled by necessity to steal food or water to gratify his hunger or generally his thirst or eat and drink what is unlawful in order to save his

1. (a) *Al Mausoo-atul-Janaiya*, Vol. 1, p. 492.
(b) *Kamil Mersy and Saeed Mustafa* p.27 Sharh Qanoon-e-Uqoobat p 300.

life. Again, take another example. A person, who is on the verge of death because of extreme cold steals firewood to make fire for himself or for whom someone else makes a fire with stolen firewood, is compelled to commit an unlawful act in order to save his life or someone else commits such act to save him. In such a case the agent is either entangled in a serious predicament himself or finds someone else in such predicament which, of necessity, demands the commitment of the unlawful act.

(400) Conditions of the State of Necessity

There are four conditions of the presence of necessity

(a) Necessity is so dire that the agent senses a threat to his own life and limbs or those of someone else.

(b) Necessity is actually present and not merely expected. That is the reason why a hungry person is disallowed to eat carion until he is in danger of being starved to death.

(c) There is no way out other than the commitment of forbidden act. Thus if one can fulfil his necessity by legitimate means, he is disallowed to adopt unlawful means. For instance, when the agent can purchase his meal, necessity does not warrant stealing of it by him.

(d) A forbidden act should be committed only in proportion to necessity. Thus a hungry man can eat of another man's meal to the extent of warding off the threat to his life posed by starvation.

(401) Injunction Pertaining to State of Necessity

The injunction as to the state of necessity varies with the nature of offence. There are certain offences which are not affected by necessity at all. There are others that become legitimate act in the state of necessity and still others whose punishment is remitted in such a state.

(402) Offences Unaffected by Necessity

Necessity does not affect the offences of murder, infliction of injury and amputation of limbs. Thus a person driven by necessity is forbidden to kill or injure another person or cut off his limbs in order to save himself. Let us illustrate this injunction by an example. Suppose that some people are on board of a boat which

is about to sink because of excessive load. In such a situation it will not be warrantable for any of the person aboard to throw any other person into the river in order to save his own life as well as the lives of others by decreasing the load of the boat. If anyone does so he will not be exempt from punishment.

All the jurists agree that the person whose killing injuring or amputation is unlawful is one who has been declared immune by the Shariah. But if the person in question is vulnerable *(Mahdar)* or one who ceases to be immune, then killing him is not only lawful but under certain circumstances obligatory.

Imam Malik maintains that eating of human flesh is unlawful in the state of necessity even if the person whose flesh is eaten is vulnerable under the Shariah. For instance if one is starving to death, even then he is disallowed to eat the flesh of a vulnerable man, whether he is alive or dead. The predominant position of the Hanafites is identical with Imam Malik's views.

On the contrary, Imam Shafi'ee and Imam Ahmed hold that it is warrantable for one driven by necessity to eat the flesh of a vulnerable man, whether alive or dead. Some of the Hanafites subscribe to this view. As a matter of fact the Shafi'ee school as well as the said Hanafites allow, in the state of necessity, eating the flesh from the corpse of an immune person. They argue that the sanctity of a living man is greater than that of a dead man. Imam Ahmed, however, disallows eating the flesh from the corpse of an immune man.[2]

Imam Shafi'ee also maintains that a person driven by necessity may cut off his own flesh to eat in order to save his life, provided that in cutting it off his life in all probability is not endangered.[3] All the other jurists are opposed to such an act of life saving in the state of necessity.

One person driven by necessity is not allowed to take away the food belonging to another person who is also in a state of necessity; for the latter being the owner of the food has greater

1. (a) *Mawahib-ul-Jaleel*, Vol.3, p.233.
   (b) *Hashia Ibn Abideen* Vol.5, p.296.
2. (a) *Al Mughni*,Vol.11, p. 79.
   (b) *Asnal-Matalib*, Vol.1, p. 571.
3. *Asnal-Matalib*, Vol.1, p.571.

right to it while both of them are at par in respect of necessity. If the former takes away the food of the owner and the owner dies, he will be accountable for his death and will be regarded as a killer without any right.[1]

A person in dire need takes away the food belonging to another person in proportion to as it is required to save his life provided that the latter does not need it. If it is necessary to fight with the owner in snatching the food from him he is allowed to do so and if the person driven to necessity is killed in the fighting the killer will be accountable on criminal grounds and will not be treated as one in a defensive state. However, in case if the person in dire need kills the owner of the food, the life of the latter would be regarded as vulnerable since he fights with a person driven by necessity and thus commits transgression. He is, therefore, like an aggressor. But no person in the state of necessity is allowed to resort to fighting as long as he can buy the thing required to save his life or prevail upon the owner to give the thing to him, however high the price of the thing may be, as it will be incumbent upon the person in need to pay the equal value of the requisite thing.[2]

This is the position taken by the Imam Malik, Shafi'ee and Ahmed and is not any different from the view held by Imam Abu Hanifa. But Imam Abu Hanifa allows the person in dire need to fight only unarmed with one preventing him from eating food. He prohibits fighting with arms.[3]

(403) Crimes Warranted by Necessity

Crimes for the justification whereof a provision exists in a state of necessity are warrantable acts. Such crimes exclusively related to eating and drinking. For instance eating of carion or swine's flesh and drinking of blood or 'filthy liquid' are unanimously allowed in a state of necessity, provided that the commitment of such acts is confined to the fulfilment of necessity. For instance if a hungry person is driven by necessity, he is allowed to eat carion in proportion as it is enough to save one

1. (a) *Al Mughni*, Vol.11; p.80.
2. (a) *Al Mughni*, Vol.11, p.80.
   (c) *Mawahib-ul-Jaleel*, Vol.3, p 234.
   (b) *Mawahib-ul-Jaleel*, Vol.6, p. 240.
   (b) *Asnal-Matalib*, Vol.1, p. 572

from starvation, or, according to one opinion, to ward off the threat to life or, according to another opinion, to gratify one's hunger. However, if the necessity is likely to continue, one may act in excess of appetite. This for instance, would be the case with one who is lost in the wilderness and there is no hope for him to find a way out of it.[1]

A traveller can, in the state of necessity carry with him forbidden food and drinks to serve him as provisions during his journey, provided that he knows that the state of necessity would continue and that he eats such forbidden things only when he needs them again.[2]

The jurists, however, differ on the question of committing a forbidden act allowed in the state of necessity. Thus some of them are of the view that commitment of such act is not the right of the agent. It is incumbent upon him and this is the preferable view. Hence if a person who is being starved to death does not save his life by eating what is unlawful he would be committing a sin. Says Allah:

"Cast not yourselves to perdition with your own hands." (2:195)

Again,

And do not take your own lives Lo! Allah is ever Merciful unto you. (4:29)

In short, man is duty-bound to eat of unlawful edibles as much as Allah has allowed and save his life. Other jurists, however, hold that the permission to eat and drink in the state of necessity what is forbidden simply constitutes the leave to do so and, therefore, it is a right and not an obligation. A person in dire need may or may not eat or drink it.[3] This is the view held by a minority of Jurists.

(404) Crimes whose Punishment is Invalidated by Necessity

Apart from the kind of crimes dealt with above, commitment

1. *Hashia Ibn Abideen*, Vol.5, p.296.
   (a) *Al Jassas, Ahkamal-Quran* Vol.1, p.130.
   (b) *Asnal-Matalib*, Vol.1, p.570. (c) *Al-Mughni*, Vol.11, p.73.
2. (a) *Mawahib-ul-Jaleel*, Vol.3, p.233.
   (b) *Asnal-Matalib*. Vol.1 p.570. (c) *Al Mughni*, Vol.11, p.75.
3. *Al Jassas, Ahkam-ul-Quran*, Vol. 1, p. 128.

of other category of crimes in the state of necessity would incur no punishment. For instance, if a starving man steals edibles and drinks or a person aboard a sinking boat casts away the effects on it to lessen the load thereof will be liable to no punishment.

The condition of exemption from punishment is that the agent in dire need commits a forbidden act in proportion as it is absolutely essential. Thus a starving man may steal food only as much as it is necessary to gratify his hunger. It is not warrantable for him to take away with him food over and above that which fulfils his dire need. Similarly, a person on board a boat may cast away only as much cargo as may save it from sinking.

Another condition of exemption from punishment is that the forbidden act fulfils the necessity, otherwise the agent will be liable to punishment for committing such an act. For example the agent steals certain things, sells them and buys edibles for the price he receives for those things. In such a case he cannot be regarded as being in a state of necessity; for the act of stealing does not directly fulfill the necessity. However, a person who steals bread may say that he was in dire need thereof, inasmuch as bread fulfills the need directly.

(405) Injunction Pertaining to Accountability in the State of Necessity

Injunction relating to accountability in the case of duress also applies to necessity. Thus a person committing a forbidden act in the state of necessity is accountable although not liable to punishment. But if the act is legitimate, he will not be accountable.

(406) The Shariat Basis of the State of Necessity

The basis of necessity in the Shariah is the same as that of duress. Thus where punishment is not neutralized, the act would remain punishable, inasmuch as there is no duress proper. In the absence of taboo the act becomes permissible because the reason for prohibition is no longer there. On the contrary, where punishment is neutralized, the act will not obviously be punishable owing to duress proper and absence of choice. We have dwelt on this problem at large in the context of duress.

II Intoxication

(407) Drinking and Intoxication

According to Shariah drinking of liquor is totally unlawful whether it causes intoxication or not. Drinking is a *hud* crime punishable by flogging.

With the exception of Imam Abu Hanifa and his followers all the jurists are unanimous that a smaller quantity of anything is unlawful, whose substantial quantity causes intoxication, whether we call it liquor or give it some other name. But Imam Abu Hanifa draws a line of distinction between liquor and other intoxicants. According to him drinking of liquor is punishable whether it intoxicates or not but the use of all the other intoxicants does not incur punishment until the agent is intoxicated.

According to Imam Abu Hanifa liquor or alcohol comprises the following inebriating drinks:

(a) The juice[1] of fresh grapes kept unused, which gets strong by fermentation and causes foam.[2]

(b) The said juice whereof less than two thirds is evaporated by boiling.

(c) The liquid of raisins and dried dates which turns strong without boiling.

But if the juice[3] of fresh grapes is boiled and two thirds is evaporated, the liquid of raising and dried dates which is boiled and two thirds thereof is not evaporated and the drinks made of boiled or unboiled liquid of barley, wheat, maize etc. are all intoxicants[4] and not liquor. Their use is punishable only when it causes intoxication.

The injunction pertaining to intoxicants also applies to all kinds of narcotics like hemp etc. But the use of narcotics does not entail the punishment of *hud* because such punishment is laid down exclusively for the use of liquor and intoxicants. *Hud* is a

1. *Badae'-wal-Sanae'*, Vol. 5, p. 112.
2. Imam Muhammad and Imam Abu Yousuf maintain that the juice of grapes is liquor whether it is fermented or not.
3. *Badae'-wal-Sanae'*, Vol. 5, p. 112.
4. *Al Mughni*, Vol. 5, p. 327.

severe punishment which cannot probably be applied to the use of narcotics. The consensus of the jurists is that use of such drugs is punishable by *ta'zeer*[1] or penal punishment.

Definition of Intoxication

Intoxication means to be out of senses with the use of liquor etc. An intoxicated person is one who is out of his senses, is incapable of understanding any thing and of distinguishing between male and female or heaven and earth. This is the opinion of Imam Abu Hanifa.[2] But Imam Muhammad and Imam Abu Yousuf hold that an intoxicated person is one who naves in a state of delirium. This accords with the following verse of the Holy Quran:

> "O ye who believe! Draw not unto prayer when ye are drunken, till ye know that which ye utter." (IV : 43)

Thus a person who does not know what he utters is intoxicated. All the other Imams subscribe to this view.[3]

(408) Criminal Accountability and Intoxication

According to the predominant opinion of all the four schools of jurisprudence if a person out of his senses is forced to drink an inebriating liquid or if he drinks it of his own accord without knowing that it is a strong drink or drinks it as a medicine, he will not be liable to punishment for he commits the offence when he is stupefied and is therefore subject to the injunction pertaining to an insane person or a person in sleep.

The state of necessity is akin to the state of duress. For instance, in the case of choking while eating or drinking the agent experiences difficulty in breathing caused by obstruction in the respiratory tract and in order to be relieved of it he drinks wine as there is no other drink immediately available, nor is he aware of its being liquor either, and even being aware of its being liquor, is intoxicated. If he commits any offence in the state of intoxication, he will not be liable to punishment because he is driven by necessity to drink the liquor. However, any person

1. According to Imam Abu Hanifa this injunction applies to intoxicants and *narcotics* alike.
2. *Badae'-wal-Sanae'*, Vol. 5, p. 118.
3. *Al Mughni*, Vol. 10, p. 235.

who uses an intoxicant intentionally; without any excuse or takes an intoxicating drug unnecessarily and who is, consequently, out of senses, will have to account for every offence he commits intentionally or by mistake in the state of intoxication and will be punished for it; for he loses his senses of his own accord and that too by doing something which in itself constitutes an offence. He will be punished so that he may be chastised and also that it is necessary to do so, as annulment of punishment in such a case would encourage every criminal to drink and he is exempted from punishment.

But the jurists of all the four schools advocated a different/ secondary view,[1] which however has been abandoned. According to this view the intoxicated person is not accountable at all for whatever he does, whether he uses the intoxicant or liquor of his own accord or under the pressure of necessity or as unaware inasmuch as he is out of his senses. As understanding is the basis of accountability, he cannot be held responsible in the absence of understanding. This view was originally held by Hazrat Usman (R.A.A.). It is subscribed to by Imam Shafi'ee as well as some jurists belonging to all the four schools. At any rate it has now been abandoned.

(408) Civil Accountability and Intoxication

An intoxicated person is accountable for his acts on civil grounds, although he is exempt from punishment for being in the state of intoxication. This is because the rights to life and property are immune i.e. to be respected, therefore, an intoxicated person can on no account be exempted from accountability and no excuse under the Shariah warrants the cessation of the immunity of the rights in question. As a person out of senses does harm to others, he cannot be exempted from accountability on the ground of his exemption from punishment on account of his being in a state of intoxication. Since he is accountable he has to pay the penalty for the harm caused by his act. The reason for this is that suspension

1. (a) *Al Mughni*, Vol.9, p. 358 and Vol. 10, p. 325.
   (b) *Mawahib-ul-Jaleel*, Vol. 6, p. 317.
   (c) *Tabserat-ul-Hukkam*, Vol. 2, p. 227.
   (d) *Tuhfat-ul-Muhtaj*, Vol.4, p.118.
   (e) *Al Muhazzab*, Vol. II, p. 82, 165, 204.
   (f) *Al Bahr-ul-Raiq*, Vol.5. p. 25.
   (g) *Sharah Fathul Qadeer*, Vol.4, p. 178.

of senses is no cause for the vulnerability of life and property, although it does constitute the ground of the cessation of punishment.

(409) The Shariah and the Modern Laws Compared

The views held by the pundits of the modern law in this context are in tune with those of the jurists of Islam. Only a very limited number of them are in accord with the minority of the jurists who maintain that under no circumstances are the crimes committed in the state of intoxication punishable. But a great majority of the modern legal experts hold that if the offender uses intoxicants or liquor under duress or is unaware and commits an offence when he is out of senses, he will incur no punishment. However, if he uses anything intoxicating of his own accord, he will be liable to punishment for whatever offence he commits while he is out of his senses.

The relevant provision of the Egyptian law is in complete harmony with the predominant position of the Islamic Shariah, which exempts the agent from punishment for whatever offence he commits in the state of unconsciousness in case if uses an intoxicant under duress or unaware of its being an intoxicant.

Insanity

(410) Introductory

If a man is capable of understanding and choice, he is responsible according to Shariah i.e., accountable for whatever he does. But in the absence of either understanding or choice, he ceases to be responsible. A responsible person's capability to understand means that he is able to turn his intelligence to account. In other words if his understanding is vitiated by sickness or insanity, he will be treated as one lacking understanding.

A child is normally born with the faculty of understanding. But in some children this faculty is wanting right from the time of birth. Besides, the mental capacities of a child grow side by side with his body. But it sometimes happens that owing to some malady the child's understanding ceases to grow along with its

body may be that even after coming of age his mental faculties are paralyzed on account of illness or shock. It should, therefore, be presumed that no time can be fixed for the loss of mental faculties.

The lack of mental faculties takes various forms. Thus sometimes it consists in the total loss of mental faculties, which the jurists term as total insanity. Sometimes it is intermittent and is known as lunacy. Sometimes it is partial. In such cases the mind ceases to perform its normal function in one particular matter, while in all the other matters the faculty of understanding remains intact. Such mental condition is termed as partial insanity. It also happens sometimes that mental faculties are not totally lost but are just enervated. In such a case understanding is not completely absent. It is subnormal. Such a state is known as idiocy.

There are other cases of the loss of mental faculties besides those mentioned above. Each case is given a separate name but all of them owe themselves to the loss of understanding. The injunction pertaining to various manifestation of insanity is that whenever the faculty of understanding ceases to function, criminal accountability comes to an end and the other way round.

(411) Definition of Insanity

We may define insanity in the light of above statement as loss of understanding, mental disorder or enervation of understanding. This definition includes insanity, idiocy and other conditions in which the faculty of understanding is lost on account of illness or some psychological condition.

(412) Total Insanity

If a person is absolutely incapable of understanding anything or is stark mad, he suffers from total insanity, whether his insanity is inborn or he develops it at any stage in his life. It is called total insanity because it is a constant state and constitutes unqualified madness, in which the insane person does understand whatever is said to him. According to some jurists one stark mad is under the sway of insanity. According to others a person under the sway of insanity is one whose insanity is constant whether he does not

understand anything at all or whether he is capable of understanding certain things and incapable of understanding certain others.

(413) Lunacy

Lunacy is the mental condition wherein the lunatic does not understand anything at all, but his insanity is intermittent appearing in rifts, and not constant. In a fit of insanity the lunatic is totally bereft of understanding, when the fit subsides he is normal again. Thus lunacy is in reality total insanity although it is not constant. As understanding is totally lost in lunacy, the person suffering from it is not accountable for whatever he does in a fit of insanity. But when the fit subsides and he is normal again, he will be accountable for whatever offence he commits in the state of normalcy. On the contrary, a person totally insane or stark mad is not criminally accountable at all, because his insanity is total and constant.

If a lunatic is partially normal in the sense that he is incapable of fully understanding things under certain circumstances, while he is fully capable of understanding everything under others, then in the state of partial normalcy he will be subject to the same injunction as is applicable to one suffering from partial insanity.

However, if the lunatic becomes normal, but his understanding is weakened, then he would be subject to the injunction applicable to idiots.

(414) Partial Insanity

If insanity is not total but is confined to one or a few aspects of the agent's thinking, his capacity to understand being neutralized in relation to those aspects while being normal concerning everything else, his insanity may be described as partial.

The agent partially insane is accountable for matters concerning which his understanding is normal and will not be accountable for matters wherein his faculty of understanding ceases to function.

Sometimes partial insanity is intermittent. The patient suffers from it in fits. When he does not have the fit of insanity, he is responsible for whatever offence he commits. Partial insanity is

often constant and the person having a ceaseless fit thereof is termed by the jurists as under the sway of insanity, that is one constantly insane, whether partially or totally. Obviously the nomenclature in this context is of little consequence to us, exemption from accountability owes itself to the absence of understanding. It so being the case, the insane person will be exempt from accountability when he is totally devoid of understanding.

(415) Idiocy

Idiocy is defined by the jurists as the condition of a person who is deficient in intelligence, whose speech is incoherent and whose action is indiscreet, whether such conditions are innate or is the result of some disease developed at a later stage. In other words idiocy is a lesser degree of madness and therefore, it may be said that in the case of insanity intelligence is lost altogether, whereas in idiocy intelligence is deficient. There are various degrees of such deficiency, but the understanding of an idiot is not equal to a man with average intelligence, whatever the degree of his idiocy.

Most of the jurists admit that idiocy is actually a kind of insanity and that although the degree of understanding in idiots vary with those of idiocy, some idiots do not over grow the stage of a child's percipience. But some of the jurists maintain that some idiots have as much understanding as a percipient child while some have as much as impercipient child. In other words, there is no difference according to these jurists between insanity and higher degree of idiocy. Hence the distinction made by these jurists between insanity and the higher degree of idiocy is that the former is characterized by emotional disorder while idiocy constitutes a tranquil state.

Accept whichever of the above opinions we may, the truth of the matter is that they are the names of existing realities and what really matters is the substance and not the name. What really is of consequence, then is that a person devoid of understanding is exempt from punishment, whether you call him an idiot, a mad man or by some other name.

(416) Epilepsy, Hysieria etc.

In certain nervous diseases also the patients lose consciousness and understanding. In such conditions they do act and utter words without having the least consciousness of what they do and say, and know not the significance thereof. The jurists have not discussed such states of ailment separately. Perhaps the reason for this is that the sciences of medicine and psychology were not as advanced in their times as they are today. But in the light of the principles of Shariah, one can easily determine the injunction pertaining to abnormal conditions.

The epileptic falls unconscious with spasms. In such a condition he may do acts whereof he may not have the least idea to have been done by him when he recovers from the fit.

The patient of hysteria suffers from spasms and utters nonsense in a state of delirium. Again, one suffering from melancholia nourishes illusions and commits unwarrantable acts under their influence.

In short these patients and other cases of the like nature are subject to the same injunction as relates to the mad, provided that their understanding is suspended or reduced to the degree of idiocy at the time of committing unwarrantable acts. If, however, their understanding is normal when they do such acts, then they are criminally accountable.

(417) Obsession with Wrong Notions

Saturation of the mind with misconceptions is akin to insanity. It is an abnormal condition resulting from nervous imbecility or is hereditary. In such a condition man is obsessed with something and is compelled to do a specific act under the influence of the obsession.

For instance, an obsessed person takes it for granted that he is wronged and that certain people want to kill or poison him. He is consequently overwhelmed by emotion which urges him to kill those who want to kill him. There are also people who are not obsessed with such wrong notion but one of their uncontrolable instinct forces them to commit an act.

Such mental patients are also subject to the injunction pertaining to the insane. These are not accountable for their wrongful acts if their understanding is suspended or enervated to the degree of idiocy.

(418) Schizophrenia.

In this abnormal condition the patient sometimes presents himself as someone other than his normal self and his mode of thinking and pattern of behaviour are transformed. Even his facial expression undergoes a change. In such a state of mind he does act which he does not normally do. When he recovers from this abnormal condition he does not remember what he may have done in a fit of schizophrenia.

This abnormal state should also be linked with insanity; for at the time of committing offence, the patients' understanding is suspended.

(419) Weakness of Percipience

There are people whose understanding is stronger than that of a mad man or idiot but is not as strong as that of a fully grown-up man. Owing to their weaker understanding they make haste in committing an act but at the same time they are conscious of the kind of act they are going to commit. According to the *Shariat* laws deficiency of understanding does not warrant their exemption from punishment. The modern laws similarly do not exempt men of weak understanding from punishment. However, some legal pundits advocate reduction of punishment on the ground that such people are mentally handicapped. But there are others who emphasize harsh punishment for such agents so that they may be prevented from committing offences. According to the Shariah, however, penal punishments may be reduced but the punishments of *hudood* and *qisas* are not amenable to reduction, nor can they be commuted; for the corresponding offences are serious and closely related to public peace and collective order.

(420) The Dumb and Deaf

The dumb and deaf are criminally accountable for the offences committed by them provided that their understanding is normal at the time of committing the offences. However, if their abnormal

condition affects their understanding to such an extent that it is reduced to the degree of insanity or idiocy, they are not accountable.

Imam Abu Hanifa and his followers are of the view that the deaf and dumb are not amenable to *hud*. They will be awarded penal punishment even if they plead guilty; for to be dumb and deaf involves doubt and such a handicapped agent makes confession by signs, which admit of different interpretations. Besides, had he been able to speak he could deny the charge levelled against him as well as cross examine the witnesses. The position of the other three major Imams viz., Malik, Shafi'ee and Ahmed is the very antitheses of the Hanafites view. They treat the signs made by the deaf and dumb as correct and do not support their exemption from *hud*.

(421) Somnambulism

Some individuals do things in sleep which negative the acts they do while awake. But they also do certain things in their sleep which have nothing to do with what they do in their wakeful life.

Scientific explanation to man's walking or doing certain acts in sleep is that sleep does not affect all his capacities, which do remain active to certain degree while he is asleep. Sometimes these capacities are extraordinarily alive in sleep and the sleeping agent does things of which he is absolutely unaware. When such abnormal state runs its cycle the agent becomes normal again. But when he is awake he does not had the least idea of what he has been doing in his sleep.

A general rule of the Shariah is that a sleeping man does not incur punishment. This is borne out by the following tradition of the Holy Prophet:

> "The actions of three persons are not recorded (by the angels): a sleeping person until he is awake, a child until he comes of age and a mad man until he becomes normal."

Although the states of sleep and insanity have been mentioned together in the Hadith and the same injunction has been laid down for both the states, yet the jurists of Islam relate the state of sleep to that of duress and not to insanity. The reason for this appears to be that the somnambulist possesses understanding but

is devoid of deliberate choice, for his intention has nothing to do whatever he does in sleep but he does understand the acts he does. The acts done by him are not unreasonable. He is capable of discrimination between the useful and the useless and abstains from harmful things.

The scholars of modern law discuss somnambulism along with insanity. The grounds of treating the two states as akin is that man's understanding and freedom of choice both are suspended in sleep. It is his tendencies which move his muscles, but the agent himself neither sees nor understands his action.

But I am inclined to hold that although a person in sleep is devoid of understanding, it is more reasonable to relate his state of mind to that of one under duress than to insanity. For a person under duress does not act of his own accord and under the dictates of his reason, in spite of the fact that his choice and understanding are not suspended. He rather acts under the influence of other's reason and carries out others will. When he is moved by some extraneous force his own reason and freedom of will is of no use to him. So also is the case with somnambulist. He also has both understanding and freedom of choice but they are of no use when he acts in sleep.

At any rate, the Shariah and the modern laws are in harmony with respect to this problem; for both the Shariah and laws in force invalidate punishment for whatever is done in the state of duress and insanity. Whether we regard the sleeping agent as mad or one under duress he is not liable to punishment for offences committed by him in sleep.

(422) Mesmerism

One case of artificially produced sleep is that the subject comes under the spell of the hypnotist to such a degree that he carries out the order of the latter like an automation and cannot disobey it. The actual condition of the subject during hypnosis is not yet known for certain, but some psychiatrists are of the view that he can disobey the order to commit an offence.

If the provisions of Shariah are to be applied to such a condition then hypnosis should be treated as akin to sleep. Thus the subject is under compulsion, and any act done under compulsion

incurs no punishment. On the other hand it is difficult to establish any relationship between hypnosis and insanity; for in artificially produced sleep freedom of choice is suspended and not understanding.

Most of the scholars of modern law concur with the position of the Shariah in treating hypnotism as compulsion although they discuss it under the head of insanity.

The above injunction relating to hypnotism holds good only when the subject is hypnotized under duress, or he has no intention to commit the desired offence before being subjected to hypnotism. But if he knows that the aim of the hypnotist is to induce him to commit an offence and nevertheless allows himself to be hypnotized, he will be treated as willfully guilty of the offence, while hypnotism will be regarded as the means of its commitment. The subject will, therefore, be held accountable on criminal grounds. The modern laws are in agreement with the Shariat in this respect also.

(423) Heat of Passion

A man is criminally accountable for any offence he commits of his own accord and deliberate choice, whether he commits under the heat of passion and whether his passion is sensual or noble. Thus if the agent kills anyone under the influence of vindictive passion or extreme hatred, he will be accountable for homicide. Similarly, if the agent intensely loves someone and puts him to death in order to rid him of his sufferings and affliction, he will be accountable on criminal grounds. However, if the offence is punishable by penal punishment, then intensity of passion may, under the Shariat be made allowance for. But in the case of *hudood*, intensity of passion affects neither accountability nor punishment.

Extreme rage and hatred, according to the Shariah, warrants neither commission of crime nor exemption from accountability. If it has bearing on punishment at all, it is on the penal punishment and not on *hudood*.

Fear of wrong and transgression also invalidates criminal accountability provided that the situation fulfils the *Shariat* requirements of the state of defence or duress.

Some jurists opine that the killer of unmarried adulterer is exempt from punishment provided that he kills him in the act of adultery, because adulterer's condition in such a case is provocative and abominable. But majority of the jurists hold that in this case justification for homicide is the need to ward off evil. As the person averting evil carries out his duty, such an act is warrantable for him.[1]

The bearing of the intensity of passion on accountability has been mentioned in the Shariah, while the man-made emotional intensity has no effect on criminal accountability. However, it may be a cause for the reduction of the punishment at the discretion of the court. But some of the man-made laws accept provocation as an excuse. Similarly, the Egyptian law treats the state of adulterous coition as a cogent excuse for the husband to kill his wife's paramour.

(424) Injunction Relating to Insanity

The injunction relating to insanity varies with the time of the development of insanity. It depends on the question whether the state of insanity synchronizes with the time of the commitment of adultery or whether the offender develops it subsequent to the commitment of the offence.

(425) Injunction Relating to Insanity Developed Simultaneously with the Commitment of Offence.

If the development of insanity synchronizes with the commitment of crime, punishment stands invalidated in-as-much as the understanding of the agent is suspended at the time of committing the offence. Insanity does not warrant a forbidden act but simply invalidates punishment. All the jurists are in agreement on this point. The position of the modern laws in force is also identical with that of the Shariah. The Egyptian law makes it crystal clear that if insanity or some mental disease results in the loss of the agents understanding and capability of option, he will not be liable to punishment for any offence he commits in such abnormal condition.[2]

1. (a) *Tabsirat-ul-Hukkam*,, Vol.2, p.169. (b) *Al Bahr-ul-Raiq*, Vol. 5, p.40-41.
   (c) *Al Mughni*, Vol. 10, p.353.
2. *Egyptian Penal Law*, Article p. 62.

Civil Accountability of the Insane

The insane and those subject to the injunction about the insane are not exempt from civil accountability by virtue of being exempt from criminal accountability; for the security of the people's life and property is guaranteed under the Shariah and no excuse under the Shariah can prejudice this guarantee. Thus if the offender has any excuse admissible under Shariah for being exempted from punishment, such an excuse does not prejudice the right to compensation for the damages caused by the act of the insane offender. For the act remain unlawful although its punishment is annulled by virtue of the agents insanity and, therefore, exemption from punishment does not mean that the insane agents capability of proprietorship and using his property is suspended. Thus, in the presence of such capability, he must be held accountable on civil, grounds, for his civil accountability is actually the proprietory responsibility.

Limitations of Insane Person's Civil Accountability

The jurists are agreed that a person of unsound mind is responsible for his actions i.e., he is accountable on civil grounds. That is why it is incumbent upon him to fully recompense the damage caused by his offence. Although this is an established principle, yet the jurist's difference on the question of the extent to which an insane person is accountable on civil grounds for the offences of homicide and infliction of injury. The difference of opinion on this point arises out of the difference between the kinds of offences committed by an insane person. Thus the three Imams Malik, Hanifa and Ahmed treat an offence wilfully committed by him as a mistake inasmuch as an insane person cannot deliberately intend any act, and it so being the case his act can only be a mistake and not an intended offence.[1] Imam Shafi'ee on the contrary, maintains that an intended offence of an insane person is nothing but a wilful offence. It can never be treated as a mistake but he may be exempted from punishment on grounds of his insanity. However, his insanity has no bearing

1. (a) *Mawahib-ul-Jaleel,* Vol.6. p.242
   (b) *Badae'-wal-Sanae'* Vol.7, p.236.
   (c) *Al Mughni,* Vol.9, p.375.

on the nature of his act, because he commits it wilfully although he does not properly understand what he does.[1]

The difference in the nature of the insane person's offence would affect the compensation he has to pay for the damage caused by him; for the *diyat* for intentional offences is very heavy which has to be paid out of the personal assets of the agent. The *diyat* for mistakes is very light which is paid by the family members of the agent or he is helped by them to pay it. The same injunction is applicable in the case of offences comprising homicide and infliction of injury, as compensation for such offences is paid in the form of *diyat.* For this reason Imam Shafi'ee holds that the compensation should be paid out of the personal assets of one wilfully guilty. The other Imams, on the other hand maintain that the family members of the insane person will be under the obligation to pay the compensation for any offence committed by him because he is treated by those Imams as one erroneously and not deliberately guilty. Had they treated him as guilty of mistake and made the compensation payable out of his personal assets as an obligation, then an insane person would occupy a position lower than that of a same person guilty of error in the case of homicide and infliction of injury, inasmuch as *diyat* payable by the latter is shared by his community.

(426) Islamic Shariah and Modern Law Compared

The Egyptian and the French laws are at variance with the Islamic Shariah on this point. Both the laws do not treat the insane person as accountable on civil grounds for the offences he commits. The burden of the civil accountability in this respect has to be borne by the guardian of the insane individual. The person responsible for looking after him is accountable for the insane individuals offence because of his negligence and the latter is not accountable because he is devoid of understanding and free will. Moreover, every case of accountability must involve an error and no error can be committed without intention. In the case of an insane offender, intention is absent. Moreover, the guardian of the individual cannot claim back the amount of penalty from the insane person which the former has to pay on account

1. *Al Umm,* Vol.6, p.34.

of him. Now as a general rule the person accountable for the fault of someone else can claim the amount he may have had to pay on account of the latter.[1] The explanation to this rule offered by the pundits of the modern law is that the original fault lies is with the guardian of the person of the unsound mind, as he fails in looking after his ward whom he is responsible to prevent from doing harmful acts. But this explanation contains an element of constraint.

The provisions of the Egyptian and French laws as to civil accountability are based on the concept of error which is a traditional doctrine. But a new doctrine has of late been introduced which is called the concept of risk. This new concept is now gradually replacing the traditional one. According to this doctrine a person of unsound mind is accountable on civil grounds and will have to recompense from his assets any losses caused by his acts. The doctrine in question has been incorporated in the laws of Germany and Switzerland. Thus under the German law the insane person will have to compensate the loss caused by him as far as it is within his means to do so. The Swiss law empowers the court to order an unaccountable person on criminal grounds to pay the penalty in full or in part for the loss caused by his action. In fact the Swiss and German laws treat an insane person as accountable on criminal and civil grounds for any such act as is punishable for negligence or inattention. For instance the insane person can be justifiably held accountable if his insanity is the result of bad habits such as his addiction to intoxicants or depravity. In such a case as the original fault is present, it may be imputed to the agent.[2]

From the foregoing statement it is clear that the concept of risk is the latest doctrine and it tends to hold the insane person as accountable as the Islamic Shariah does; or rather it would be more correct to say that it is in complete harmony with the concept of Shariah. But the modern laws have come to be acquainted with the concept of risk only in twentieth century whereas the Islamic Shariah expounded it thirteen hundred years ago.

1. *Mustafa Mersy, Al Mausooat-ul-Madanya,* p.153.
2. *Al Mausooat-ul-Janaiya.* Vol.3, p. 290.

(427) Injunction Relating to Insanity Developed After Commission of Offence

There are two cases of insanity that develop after the commitment of offence. In the first place, insanity may emerge prior to the verdict of the court. Secondly, it may develop after the verdict is passed. *Insanity developing before the court's verdict:*— According to the Shafi'ets and Hambalites insanity that develops before the court passes judgement does not stand in the way of carrying the legal proceeding; for the agent's responsibility is essential only at the time of the commitment of offence. Moreover, the legal proceeding does not prejudice the position of the insane person, since the Shariah provides for strong guarantees for proceeding against offenders. The advocates of this view attach more importance to logic and actuality than anything else. What is of paramount importance to them is that the agent commits an offence, and is consequently liable to punishment. Now if he goes mad, it would not prejudice the legal proceeding, provided that such means are available as would help in ascertaining the reality; for as a result of insanity the offender would be unable to defend himself whereas the rule, is that offender's inability to defend himself will not stand in the way of legal proceedings. Thus a dumb person or one who becomes speechless after the commission of crime or can not express himself clearly are all incapable of defending themselves but their inability is no obstacle to legal proceedings. Hence an insane person cannot be treated apart from the above handicapped and because his inability to defend himself cannot obstruct legal proceeding against him. At any rate the handicapped persons referred to above are also unable to defend themselves but nobody believes in stopping or abandoning legal proceeding against them.

The Malikites and Hanafites, however, are of the view that madness developed prior to the institution of legal proceedings suspends the proceeding till the agents mental health is restored. The basis of this view is that punishment presupposes the offender's being a responsible agent as an essential condition and this condition should be present at the time of the institution of such proceeding. In other words, the offender should be an obligated person when

a legal action is brought up against him. If he is not, the action will be put off.

The Egyptian and French laws are in harmony with the position of the Malikites and Hanafites. But in both the laws the cause of suspending the legal proceeding is the inability of the offender to defend himself. This is manifest from article. 2247 of the Egyptian law of criminal investigation, which runs as follows:

"If the accused is unable to defend himself on account of some mental abnormality, legal proceeding against him will not be instituted until he recovers from the abnormality to the degree, it is necessary for his defence. If his inability to defend himself is evident in the court, it is essential to stop the proceeding.

With the jurists of Islam who are in favour of suspending the legal proceedings the reason for such measures is not the inability of the insane offender to defend himself, but the absence of the condition of punishment. Obviously this reason is more logical and weighty; for the French and Egyptian laws do not suspend legal proceedings in the case of the deaf and dumb and the person who suffers from loss of speech after committing the offence who are unable to defend themselves just as the insane person. In fact, the cases of the handicapped are much more common than those of the insane.

Injunction relating to insanity developed after judgment is passed by the court: -According to the Imam Shafi'ee and Imam Ahmed insanity of the offender developed after the court's judgment does not warrant postponement of the execution of injunction. However, if the offence entails *hud* punishment and the only proof thereof is the confession of the offender, passing of sentence will be withheld; for in the case of *hud* offences the offender has the option to go back on his confession at the time of the execution of sentence. He can do so even at the beginning of the execution thereof. If the offender backs out, execution of sentence passed against him would be withheld as it is possible that his denial or confession is true. Now as an insane person cannot go back on his confession, which he can do as a right, action on the sentence passed against him will be put off till he recovers from insanity.

But if the verdict of the court is not based on the confession of the offender, then the verdict will not be suspended by his going back on his confession. This opinion is grounded in the fact that it is the punishment of the offence which the offender commits when he is accountable for the act. Validity of sentence and the execution thereof rest on the condition of the obligated person at the time of the commitment of the offence and not before or after it.[1]

One possible explanation to this opinion is that punishment under the Shariah is designed to chastise and admonish the culprit. If the aspect of chastisement is suspended by his loss of mental proportion, the admonitory aspect should not be neutralized; for in the enforcement of punishment admonition is associated with interest of the community as a whole.

The position of Imam Malik in this respect is that the courts judgment would be put off on account of the development of insanity by the offender. However if the insane person commits an offence punishable by *qisas* and his insanity is incurable, *qisas* will be replaced by *diyat*. This is the position taken by some of the Malikites, while some other jurists of the same school recommend that such insane person should be handed over to the heirs of the murdered person. It will be up to them to subject or not to subject him to *qisas*.[2]

According to Imam Abu Hanifa punishment of an insane person would be withheld. But if he develops insanity when his punishment has already begun, the punishment will not be suspended inasmuch as the enforcement of sentence has commenced, and no punishment, as a rule, is suspended at the commencement of punishment on account of insanity. If the offender is awarded *qisas* punishment and he develops insanity after the announcement of the sentence and before his commitment to the victim's heirs for carrying out the sentence, then *qisas* will be commuted into *diyat*.[3]

1. (a) *Tuhfat-ul-Muhtaj;* Vol.4, p. 19.
   (b) *Al Mughni,* Vol.9, p.377.
   (c) *Al Iqna,* Vol.4, p.232.
2. *Mawahib-ul-Jaleel,* Vol 6, p.232.
3. *Hashia Ibn Abideen,* Vol.5, p.470.

The maxim that enforcement of sentence is suspended by the development of insanity is based on two factors:

(a) Punishment presuppose responsibility of the agent against whom the sentence is passed i.e. he should be accountable for his acts. Since the sentence is carried out when it is passed by the court, it is therefore, essential that the condition of punishment should be present, i.e. the offender should be mentally normal during the legal proceedings.

(b) Announcement of sentence by the court is the culmination of the judicial proceeding. As the condition of such proceeding is that the accused should be a responsible agent, it is necessary that he should also be a responsible person while the sentence is being carried out; inasmuch as enforcement of punishment constitute the culmination of the whole judicial or legal proceeding. The sentence will be assumed to have been, fully enforced when the offender is committed for punishment.

The French and the Egyptian laws have adopted both the Islamic concepts mentioned above. Thus under both the laws execution of the sentence will be postponed if the offender develops insanity after the final award of the court constituting condemnation to death or imprisonment. However, sentences as to money and property will not be suspended and the offender will not be physically coerced for their enforcement. In other words in providing the postponement of corporal punishments, the above laws have adopted Imam Abu Hanifa's view and in imposing restriction on the postponement of sentences pertaining to money or property, they have incorporated the doctrines of Imam Shafi'ee and Imam Ahmed.

Minority

(428) Introductory

The Islamic Shariah is the first law of the world to draw a definite line of distinction between children and grown up people. It is the unprecedented law in the history of mankind wherein such perfect principle of children's accountability have been laid

down that they have remained unchanged after the lapse of thirteen hundred years. Even today the same principles are treated as most modern for the regulation of children's accountability.

Some of the modern laws begin to adopt the Shariat principles of children's accountability after, the French Revolution. With the evolution of the sciences of medicine and psychology these laws continued to develop gradually. But in spite of their continuous amendment, they have not developed a step further than the Islamic principles and have not been able to improve upon and add to those principles of the accountability of minors.

This distinction of the Islamic Shariah may well be realized when we take stock of the position of children in the laws that were in force at the time of the revolution of the Shariah. The most important of those laws was the Roman, which constitute the basis of the man-made laws in force today, and which doubtless was outstanding among the ancient laws. But in the Roman laws, too, there is a very limited difference between the accountability of the minors and the majors. According to this law a child whose age was over seven years was accountable on criminal grounds and one under seven was treated as unaccountable when he committed an offence for the purpose of doing harm to some one. Obviously there is a world of difference between the most advanced principles of the Shariah and the crude provisions of the Roman law.

(429) Minority and Criminal Accountability

Criminal Accountability in the Shariah rests on two things: understanding and choice. For this reason the injunctions of Shariah regarding children vary with different stages from birth to puberty and the growth of understanding and freedom of choice. Man is incapable of perceiving and choosing at the time of birth. Subsequently his perception and capacity to choose grow gradually and slowly till a stage is reached at which he is capable of understanding things.

Although he is weak of understanding at this stage, yet his mental development continues steadily till he becomes capable of apprehension. The Shariah has laid the principles of criminal accountability in consideration of this natural process of mental

growth. Thus when the capacity to apprehend is lacking altogether, there can be no criminal accountability; when it is weak accountability is disciplinary and not criminal and when the child grows into a fully mature man, he becomes accountable on criminal grounds.

In other words man passes through three stages of development from birth to puberty. At the first stage he is devoid of apprehension and is, therefore, an indiscreet child. At the second stage he is a child of weak understanding but is perceptive all the same having the capacity to apprehend. At the third stage he comes of age with fully mature understanding.

(430) First Stage — Lack of Understanding

This stage begins with the birth of a child and continues up to the seventh year of its age. The jurists are unanimous on this point. At this stage a child is treated as indiscreet and devoid of understanding. Really speaking no definite age could be fixed for the attainment of discernment by a child. The capacity of percipience and discretion may be developed before or after the age of seven according to a child's environment as mental and physical capacities vary. But the jurists of Islam have fixed an age limit keeping in view the circumstances of children in order to maintain uniformity and ward off discontent among them at the time of passing judgment as also to enable the court to ascertain without difficulty if the condition of awareness and perceptiveness is present or not. The limit of seven years is a concrete yard-stick to ascertain this.

In short if a child has not attained to the age of seven, he will be treated as indiscreet, even if he outgrows the consciousness of seven years old children; for an injunction is applicable to the majority and not to exceptional individuals. The relevant injunction is that a child under seven years will be treated as indiscreet. Therefore, if a child under seven commits an offence, he will neither be punished on criminal grounds nor as a disciplinary or reformatory measure. Thus if he commits a *hud* offence like theft, he will not be subjected to the *hud* and if he kills and wounds anyone he will neither be subject to the injunction enjoining *qisas* nor will be liable to penal punishment.

Nevertheless, the exemption of child from criminal accountability does not warrant its exemption from civil accountability as well. It will have to compensate the loss in life or property caused by him out of his own possessions. The reason for this is that the Shariah guarantees the security of life and property and nobody is allowed to infringe the right to life and property of another person without justification. Even an excuse under the Shariah cannot prejudice the security so guaranteed. In other words penalty payable for any loss of life or property is neither negatived nor invalidated by any excuse admissible under the Shariah, although punishment may be nullified.

(431) Second Stage — Weak Understanding

This stage begins with the seventh year of child's age and culminates in puberty. The jurists generally fix the age of puberty at 15 years. When he is fifteen years old he attains the age of puberty according to the injunction of the Shariah, even if he does not actually come of age.

Imam Abu Hanifa personally fixed the age of puberty at 18 years and according to another view it is nineteen years for the male and seventeen years for the female. The oft-quoted view of the Malikites accords with the position of Imam Abu Hanifa i.e. the age of puberty is eighteen years, but some of the Malikites fix it at nineteen.

At this stage the perceptive child is not immediately accountable on criminal grounds and will not be subject to the *huds* laid down for theft and adultery; nor will be amenable to *qisas* for homicide and infliction of injury. Disciplinary action is also a punishment for crime in itself but it is not criminal punishment. The effect of criminal and disciplinary punishment would be that the child will not be treated as a habitual offender, and will as such be liable to only those penal punishments that aim at warning and admonition.

The reasons for treating a perceptive child as accountable on civil rather than criminal grounds have already been stated.

(432) Third Stage — Fully Mature Understanding

With puberty the age of discretion begins. i.e., when the

child according to the opinion generally held by the jurists, attains the age of fifteen, and according to Imam Abu Hanifa or a well-known view of the Malikites he is eighteen years old. At this stage man is criminally accountable for any kind of offence committed by him. Thus he will be liable to *hud* in the case of *zina* (adultery) and larceny, *qisas* in the case of homicide and infliction of wound or injury and to penal punishments in the case of penal offences.

(433) Cause of Difference in the Determination of the Age of Puberty

According to all the jurists the determination of the age of puberty owes its origin to the following Tradition of Holy Prophet:

> "Three persons are not responsible — a child until he attains the age of puberty; an individual in sleep until he is awake and a mad man until he becomes normal again." in this edict of the Holy Prophet nocturnal pollution has been indicated as the sign of end of the child's irresponsibility. As a matter of fact, responsibility begins after puberty.

The above Tradition of the Holy Prophet bears it out that the advent of puberty or the child's coming of age consists in nocturnal pollution; for puberty and discretion are indicative of full maturity or the state of perfect growth. In this state man is capable of using all his complete organs and this perfection is manifest in the wake of nocturnal pollution.

As the sign of puberty is nocturnal pollution, an adoscelent boy's coming of age is known by his potency to impregnate a woman and the discharge of semen. Similarly a girl's puberty is known by her menstruation, nocturnal pollution and pregnancy. Since these signs may appear in advance or be delayed, it has been deemed necessary to fix the age limits. Thus most of jurists have fixed fifteen years as the age limit of puberty for both boys and girls. They argue that it is reason which is really efficient and which constitutes the basis of accountability and whereupon all the relevant injunctions rest. The Shariah regards puberty as the age limit because nocturnal pollution is the sign of the consummation of reason. Nocturnal pollution does not occur later than 15 years of age. If it does not occur at this age, then there

must be some physical defect in the boy. But physical awareness does not affect the consummation of reason. In fact, as reason is fully developed man will be treated as coming of age at the age of fifteen years and injunctions will start applying to him.

The jurists who fix the age of puberty at eighteen or nineteen years argue that since applicability of injunction and responsibility according to the Shariah rest on the occurrence of nocturnal pollution, the basis of injunction must be nocturnal pollution. The injunction will be invalid when non-occurrence of nocturnal pollution is certain and the hope of its occurrence is abandoned. Despair on this count is possibly caused only when the boy's age exceeds 18th or 19th year without nocturnal pollution. The reason for this is that nocturnal pollution is deemed to take place till that age at the latest. It will, therefore, be wrong to suspend the applicability of the relevant injunction on account of doubt. In other words as long as there is hope for the occurrence of nocturnal pollution, we ought to wait. It may be hoped for till the age of 18 and 19 years. Thus there is no cause for despondency. Hence in spite of prospects of nocturnal pollution, the injunction validated by its occurrence cannot be treated as final as against the period whereafter there is no possibility of its occurrence. That is the reason why it is not reliable in the days of despair.[1]

From the foregoing discussion we learn that according to one group of jurists most of the signs of puberty appear at the age of fifteen years. They have, therefore, fixed fifteen years as the age of puberty. The other group however, maintains that the signs of puberty may be delayed up to the age of eighteen or even nineteen years and, therefore, the age of puberty should be fixed at the time when the signs thereof appear at the latest. Imam Abu Hanifa says that his view accords with the principle of Shariah. For instance, menstruation is the essential condition laid down in the injunction pertaining to the woman's coming of age, but if the menses stop, it ought be awaited till the age of despair as it is possible that menstruation starts again. Similarly, separation between an impotent man and his wife is disallowed unless copulation could not take place in different seasons of the year. If there is no hope of his recovery of potency to copulate

1. *Bada'e-wal-Sanae'*, Vol. 7, p. 171, 172.

after the lapse of a year, then verdict will be given for the separation of the couple. In the same way Allah enjoins that the disbelievers should be invited to accept Islam until there is no hope of their responding to the call. Fighting against them is prohibited unless the Muslims are despaired of their embracing Islam.

(434) Punishment of Indiscreet Child

Punishment of indiscreet child is purely a disciplinary punishment as a child is not liable to criminal punishments.

The Shariah has not laid down disciplinary punishments applicable to children, but has left it to the person in authority to choose any form of punishment he may deem proper. However, the jurists believe that beating and admonition are disciplinary punishments.

An advantage of leaving disciplinary punishments to the discretion of the person in authority is that he can propose an appropriate punishment keeping in view time and place. Thus he may beat or admonish the child, entrust him to a guardian or reformatory or to the custody of some other institution. In short there are numerous methods that can be adopted for the reformation of a child and for keeping him away from the environment in which he may have developed aberrance.

The effect of treating a child's punishment as disciplinary rather than criminal is that if he commits the same offence after coming of age which he commits before puberty he will not be regarded as a habitual offender and this would help in guiding him to the right path and making him forget the past.

(435) Provisions of Moden Laws Relating to Children

The man-made laws in force also lay down the principle that the accountability of children vary with their age. They divide the age of children into three distinct periods, although the determination of those periods is somewhat difficult. The first period consist of the early years in which the child is incapable of understanding the criminal nature of an act and its consequences. In this period he is not accountable at all. In the Egyptian law the limit of this early period has been fixed at seven years. So also is the case with the laws of England and India. According to the

Italian law a child under nine years of age is unaccountable. In short in most of the man-made laws the child is treated as exempt from accountability up to a certain age. In the second period the child becomes of aware of an act being forbidden but he is not yet conscious enough to realize that by committing the forbidden act what his position in the eyes of law will be and what consequences will ensue therefrom. That is the reason why most of the modern laws are in agreement to award punishment to children in this phase of their life, in keeping with their circumstances, or apply common punishments by reducing them. In this second phase the age limit fixed by the Egyptian laws is fifteen years, by the Indian and Sudanese laws twelve years and by the English and Italian laws fourteen years, while the French law fixed it at sixteen years.

In the third period of the age the child enters a phase wherein he is capable of fully understanding his position in the eyes of the law in committing an act. Thus he becomes accountable on criminal grounds and will be punished for any act he commits in contravention of the law in force. However, according to certain laws including the Egyptian statute the boy or girl in this phase of life is not liable to harsh punishments, such as death sentence or rigorous -imprisonment. This is the privilege of children under seventeen but boys and girls above seventeen will be awarded usual punishments.[1]

In the Egyptian law there are two phases of the second period. A child over seven and under twelve will not be subject to punishments usually warded to the offenders. There will be specific punishments for him designed to reform and discipline him, as admonition, commitment to a reformatory, entrusting him to the custody of the person in authority. As for the child above twelve and under fifteen, the court is empowered to indicate the methods of reforming him or award him a lighter punishment awarded to the offenders as usual.

If a boy is criminally accountable under the man-made laws in force, he will be accountable on civil grounds as well,

1. The reader is referred to the notes of the Egyptian penal law and the following books: (1) *Al Mausooatul Janaiya* Vol.1, p.272 and Ahmed Safyat; Shareh *Qanoon-ul-Uqoobat*, p.282.

although he is not awarded an ordinary punishment. He will be accountable on civil grounds even when he is not criminally accountable. There is no discrepancy whatsoever between the exemption of a boy from punishment because of his not being of a definite age and holding him responsible for the payment of penalty for the loss resulting from his fault.[1]

From the foregoing statement it is clear that the principles laid down by the Islamic Shariah, in respect of children, fifteen hundred years ago are applied today by the modern laws. Yet the principles of the Shariah are distinct from the modern laws by virtue of their flexibility. They can easily accommodate the methods of reforming children discovered as a result of scientific progress and experimentation in the interest of both the children and the society as a whole.

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1. *Al Mausooat-ul-Janaiya*, Vol.3, p.630.

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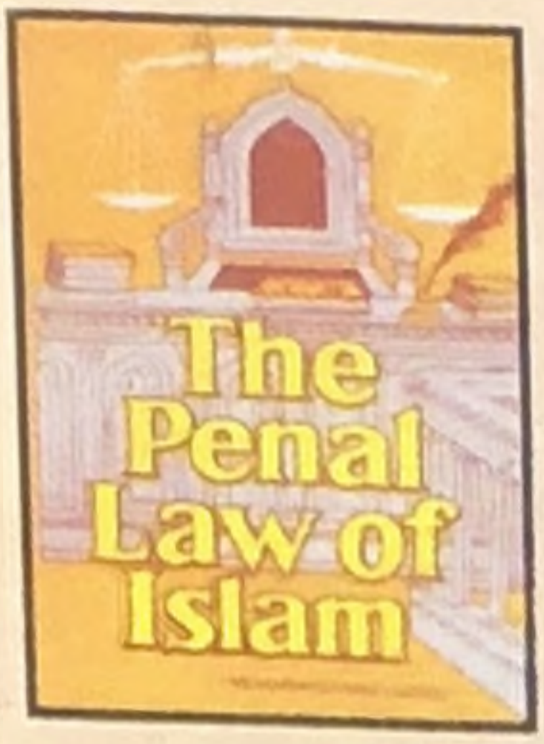

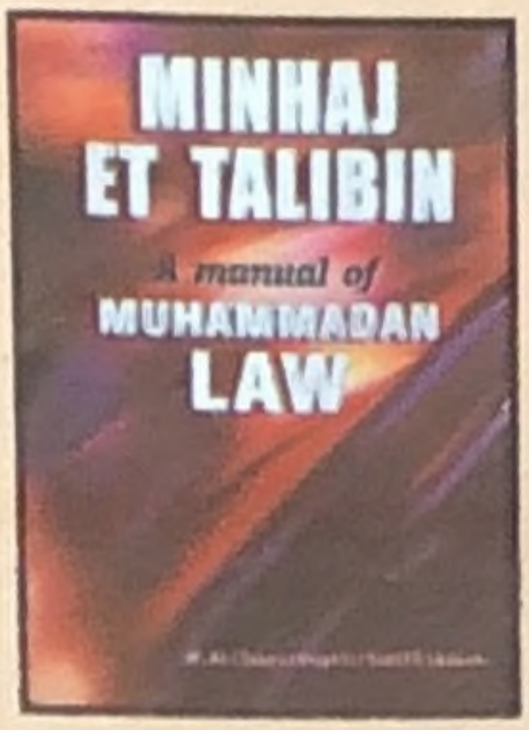

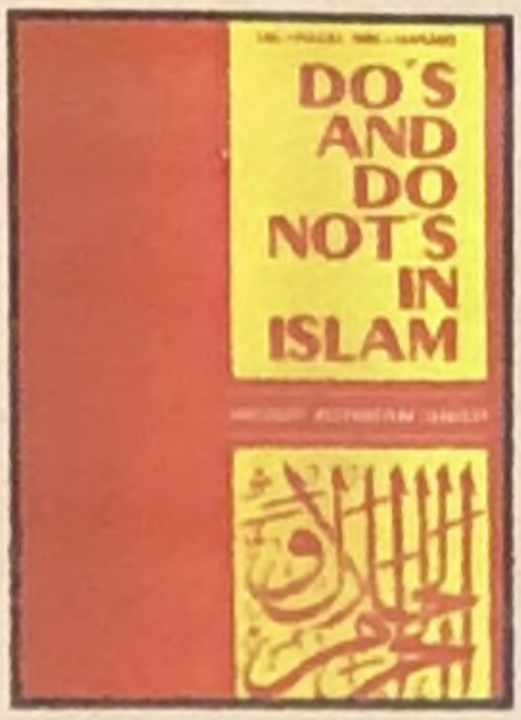

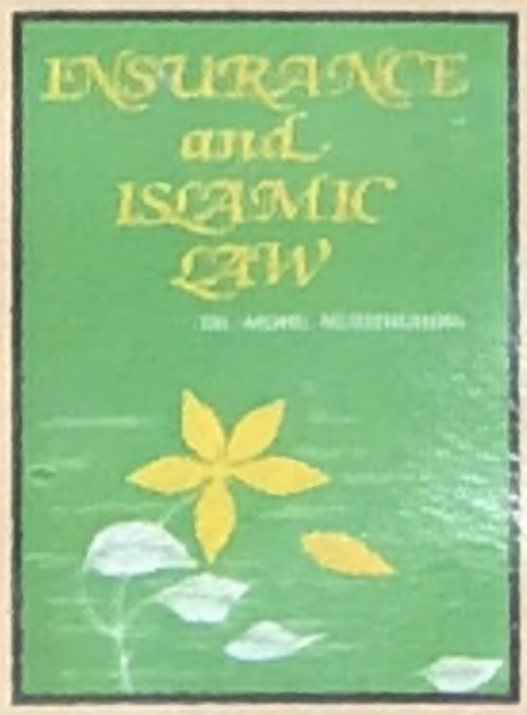

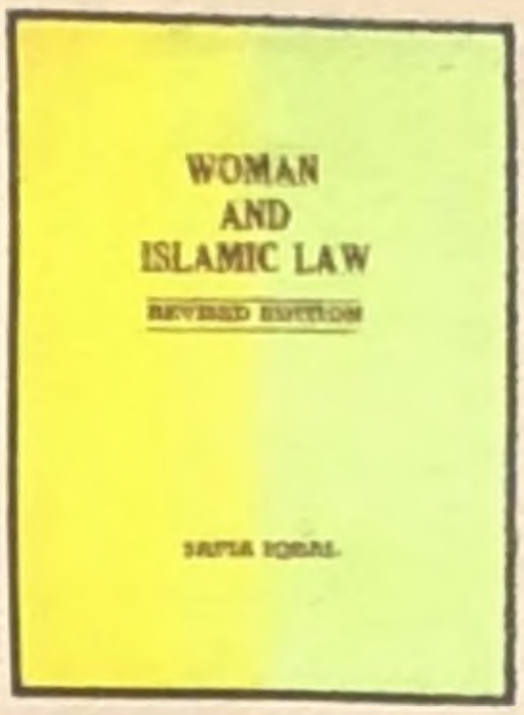

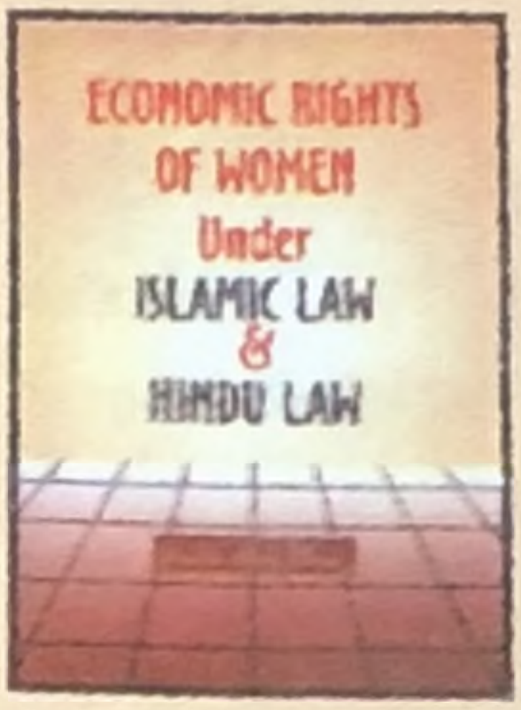

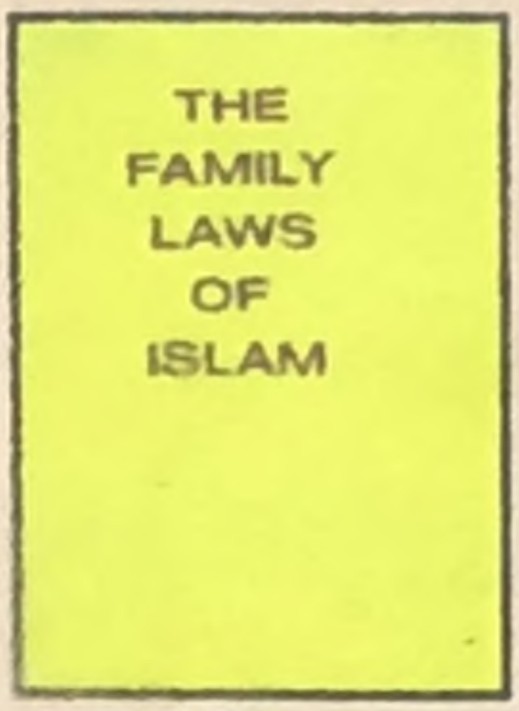

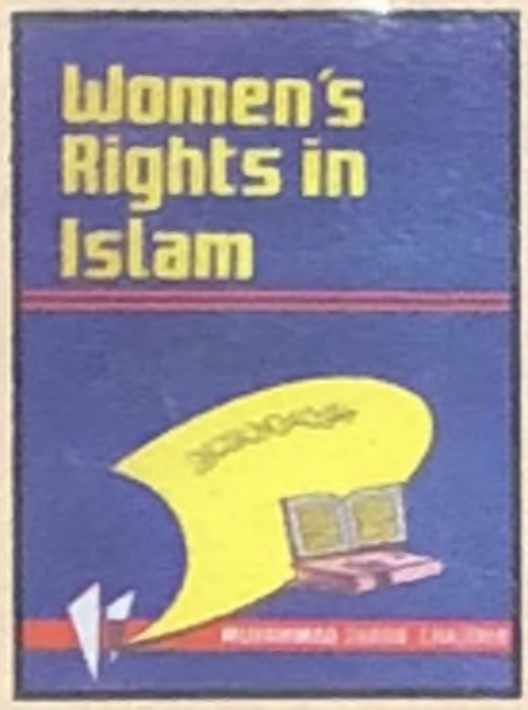

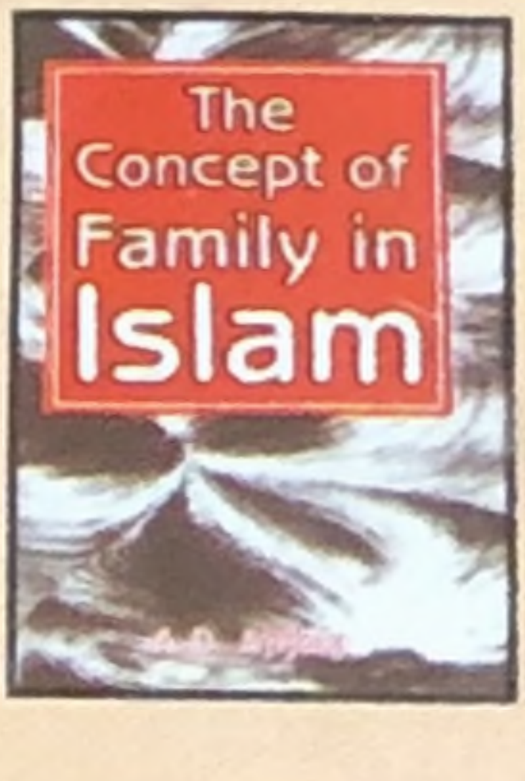

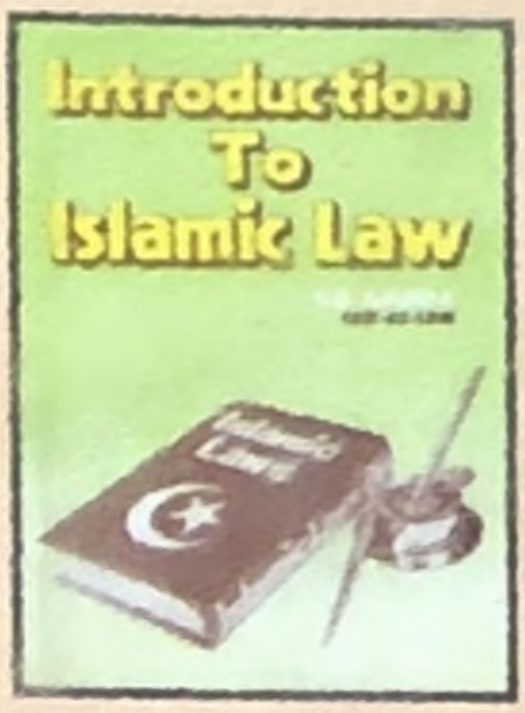

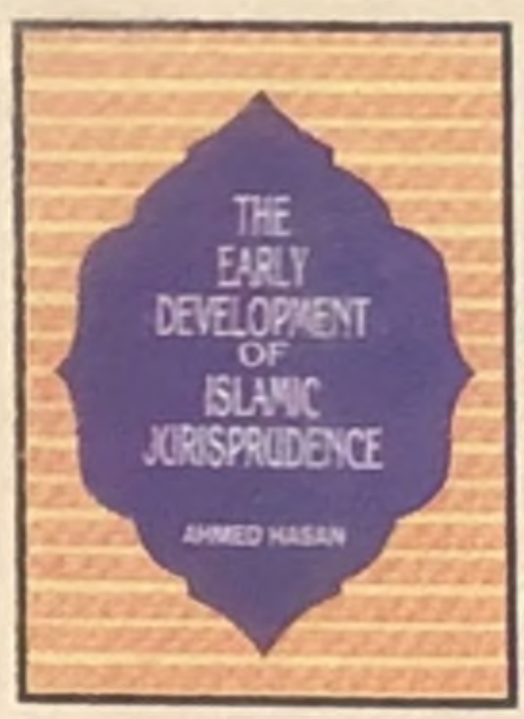

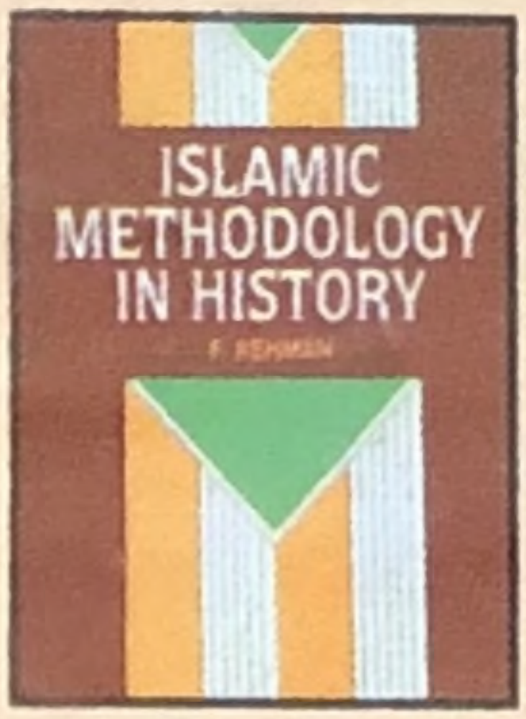

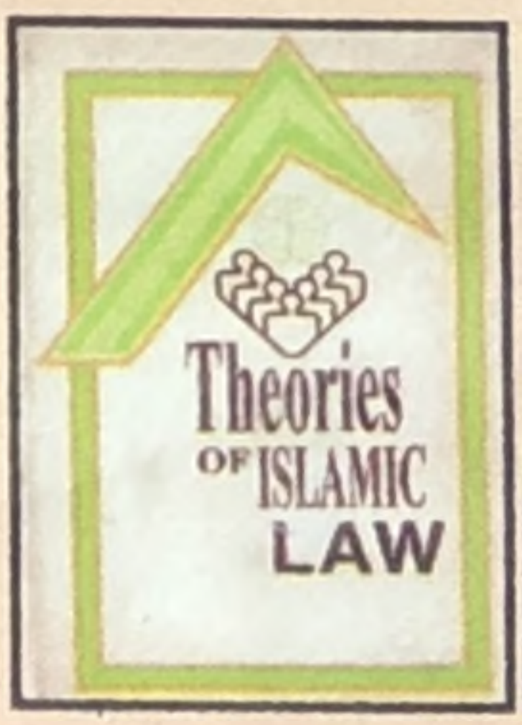

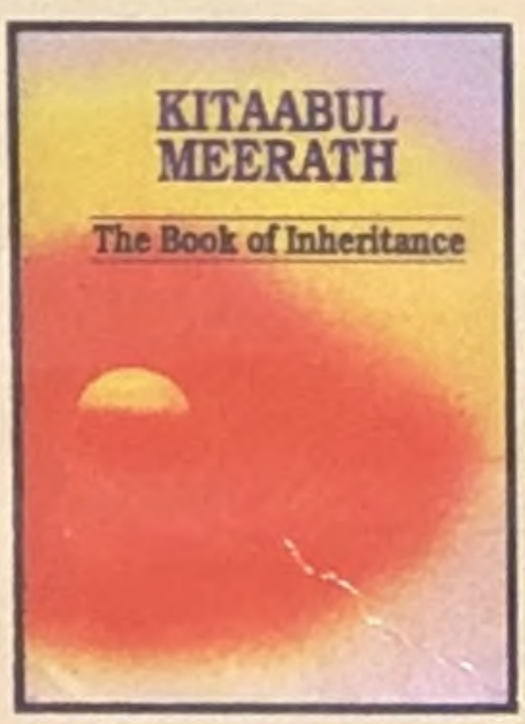

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